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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted]-1961

No. 382

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,

Appellant,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, AND THE STATE OF ALASKA

Appellees

No. 383

ORGANIZED VILLAGE OF KAKE, ET AL.,

Appellants,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,

Appellee

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR APPELLEE

RALPH E. MOODY,
Attorney General of Alaska.
JOHN L. RADER,
Special Counsel to the Governor.
DOUGLAS L. GREGG,
Assistant Attorney General.
CHARLES S. RHYNE,
Attorneys for Appellee.

Of Counsel:
RHYNE & RHYNE,
400 Hill Building,
Washington 6, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,

Appellant,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA, AND THE STATE OF ALASKA

Appellees

No. 327

ORGANIZED VILLAGE OF KAKE, ET AL.,

Appellants,

v.

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,

Appellee

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

BRIEF FOR APPELLEE

JURISDICTION

The District Court for the Territory of Alaska ruled that fish traps are an unlawful device in Alaskan waters and that the regulations of the Secretary of the Interior permitting fish traps in 1959 were void.

This was so because the Secretary, while managing the fishery for a transitional period after statehood, was bound by *existing law* not to permit fish traps nor to create any exclusive or several right of fishery. The "existing law" was the so-called White Act (48 U.S.C. 221, *et seq.*) which, pursuant to Section 6(e) of the Statehood Act, 72 Stat. 339 (1958), continued in effect (insofar as it was consistent with the State Constitution) until January 1, 1960.

In the proposed fishing regulations for 1960 (Appendix 3), the Secretary *for the first time* claims Section 4 of the Statehood Act as his authority. Appellants assert that Section 4 provides them with immunity as long as they are engaged in fishing. Thus, the rights of all litigants are, for the first time, made to turn solely upon the construction of Section 4 of the Statehood Act.

When it submitted its Brief in Support of Motion to Affirm or Dismiss (pp. 16-17), Appellee was of the belief that the Secretary of the Interior was claiming only 6(e) as his authority, and that future reliance upon Section 4 "was possible but improbable." At that time, Appellee admitted that if the Secretary claimed Section 4 as his authority [as he has now done in the 1960 proposed regulations (Appendix 3)], then a justiciable issue would be presented to this Court. We have already briefed the "moot issue."

After examining Briefs of Appellants as well as the Briefs of the Solicitor General, we believe the position taken by them, i.e. that the lower court was the highest court of the State, is correct.

STATEMENT OF THE CASE

It is essential in this litigation that the relationship of the Alaskan native to the total Alaskan community be understood. The status of the Alaskan native is a specific fact in this litigation. This is so because this Court must decide whether or not the Federal Government can now extend its arm into Alaska to confer special privileges on certain State citizens against the will of the State. Accompanying this problem is the associated problem of ascertaining the extent of State control over its largest resource, the fisheries.

The State can control its fishery only to the extent that it can control its citizens, both native and white, who fish. For the foregoing reasons, Appellee presents this Statement of the Case although perhaps it is presumptuous in assuming that this Court is not already as familiar with Alaska as it is with other states.

Appellants are three Indian corporations located in southeast Alaska.

> "The mode of life for the southeast Alaskan Indian is much the same as that of the whites. The Indians live either in villages of their own or in the principal towns such as Craig, Juneau, Ketchican, Petersburg, Sitka, and Wrangell . . . The Indian lives in the same type of residence as the white man, wears similar clothes, and eats similar food. He is a citizen and a voter. He works alongside of and in competition with white citizens at the available local vocations. Both Indians and whites take wood for domestic purposes from national forest land (without permit or payment) but otherwise make little use of the forest areas. Fishing for food is done in saltwater, not in the fresh water

streams. Both white men and Indians trap and hunt over the same areas. The Indians adjustment to the white man's way of life is about complete." [1]

Alaska entered the Union on January 3, 1959, with a state constitution which prohibited the use of the commercial fish trap as a means of taking salmon (Ordinance No. 3 of the State Constitution). Salmon are a free-swimming anadromous fish,[2] and the salmon industry is Alaska's largest industry.[3] The total salmon pack has dwindled under federal control and management from a peak of nearly 7,000,000 cases in 1918 to less than 3,000,000 cases in 1953 [4] and finally to the lowest pack in history—under 2,000,000 cases in 1959.[5] The people of Alaska have demonstrated their desire to abolish the fish trap [6] as a means of taking salmon over and over again during the decade and a half preceding statehood.[7]

---

[1] REPORT OF SECRETARY OF AGRICULTURE BENSON TO CHAIRMAN, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, JAN. 11, 1954. See Committee Print No. 12, supplemental reports dated Jan. 11, 1954 on H.R. 1921, 83rd Cong., 2d Sess. 5-6.

[2] *Anthony* v. *Veatch*, 220 P.2d 493 (1950).

[3] See Appendix 2.

[4] GRUENING, STATE OF ALASKA (1954) 210, 405. This book was cited and the author described as "our foremost Alaskan authority" in *Tee-Hit-Ton Indians* v. *U. S.*, 348 U.S. 272, 294.

[5] See Appendix 1: PRELIMINARY REPORT OF THE U. S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE BUREAU OF COMMERCIAL FISHERIES —ALASKA REGION.

[6] For description of fish traps, see GRUENING, STATE OF ALASKA (1954) 170-171. See also *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87.

[7] Time and again in recent years, the Territorial Legislature has sent memorials to Congress praying for the abolition of fish traps.

As soon as the first state legislature was convened, it passed legislation to implement the constitutional fish trap ban (Chapters 17 and 95, SLA 1959). Traps in Alaska, under state law, were abolished without exception. That traps should have been abolished for all persons without an exception for natives [8] is not unusual in view of the long and unrelenting fight by the Alaskan Native Brotherhood to end fishing by means of traps.[9]

This is the customary method employed by the legislature to request of Congress action on matters over which the Territory had no control, such as the state fishery. For example, see Session Laws of Alaska 1947, 325-326; 1949, 488-489; 1953, 401-402; 1955, 447-448. See also Ordinance No. 3 of State Constitution approved in 1956 and 1959 implementing legislation, i.e., Chapters 17 and 95, SLA 1959. See also GRUENING, STATE OF ALASKA (1954) 397-399.

[8] 4 of the 8 members of the State Board of Fish and Game are natives or are married to natives. See also, THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES TO THE U. S. COMMISSION ON CIVIL RIGHTS, 1959 (Govt. Print. Office 1960) 48 *et seq.* The Mayor of Appellant Angoon, Andrew Gamble was a member of the Commission, 48.

[9] It is significant that as recently as November 1959, when only native traps had been fishing, the Alaska Native Brotherhood by resolution reiterated its stand for complete abolition of fish traps. The resolution, front page news all over Alaska, was as follows:

"Convention at Yakutat, November 9-14, 1959.

RESOLUTION No. 64-36, INTRODUCED BY KLAWOCK, CAMP #9

ENTITLED: Abolition of all Fish Traps

Whereas, the native people of Alaska, through their officially recognized organization, have consistently opposed the use of fish traps in Alaskan waters, and

Whereas, their opposition to these fish traps is in no way contrary to the State Constitution of Alaska,

THEREFORE BE IT RESOLVED that this convention of the Alaska Native Brotherhood and the Alaska Native Sisterhood

The members of the three Appellant corporations voted for the abolition of traps (Opinion of District Judge Raymond J. Kelly, R. 59, 60).

Metlakatla has been in the canning business since 1914.[10] Kake and Angoon have used fish traps since 1950 and 1948 respectively (R. 83, 102). All three corporations were put into the fish canning business by the Federal Government and all three are heavily in debt to the United States.[11]

Since 1958, other communities (native and white) have been forced to operate canneries without operating fish traps, and must secure their fish with seine fleets or by purchase from independent seine boats (R. 48, 51, 52, 53).

Following the filing of an information against one native, one white man (a Whiz Fish Company employee from the State of Washington) and the Whiz Fish Company, a corporation installing traps for Appellants and managing one cannery, the three Indian corporations Appellants here sought injunctive relief (R. 5,

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reiterate our stand for complete abolition of traps, and that a copy of this resolution be directed to the Governor of Alaska.

/s/ A. E. WIDMARK,
Grand President, A.N.B.
Attest /s/ C. E. PECK,
Grand Secretary, A.N.B.

The Alaska Native Brotherhood is an organization of stature and is recognized as such. See COHEN, FEDERAL INDIAN LAW (revised by U. S. Department of Interior 1958), page 963.

See also GRUENING, STATE OF ALASKA (1959) pages 397-398.

[10] *Alaska Pacific Fisheries* v. *United States*, 240 F. 274, 278 (9th Cir. 1917).

[11] Affidavit of Haldane (R. 30, 31); affidavit of Albert Thompson (R. 98); affidavit of Samuel Johnson (R. 116).

82 and 102) in the District Court for the District of Alaska, Division No. 1, at Juneau. Following dismissal of the complaints by the District Court, the plaintiffs appealed to the Supreme Court of the United States for injunctive relief pending appeal. Oral argument was heard on July 10, 1959. Under authority of Justice Brennan's injunction, the Appellants operated their traps during the 1959 salmon season.

On April 10, 1960, Governor William A. Egan of Alaska received notice from Secretary of the Interior Fred A. Seaton that again in 1960 fish traps would be sanctioned under proposed Federal regulations.[12] These proposed regulations (Appendix 3) are drastic and far-reaching. Appendix 4 is a map showing the area of southeastern Alaska indicating waters in which Indians can fish under the regulations of the state or those proposed by the Secretary of Interior, *whichever are more liberal.* A cursory examination of the census figures will show that the inability of the state to regulate native fishing will constitute an insuperable obstacle to the ad-

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[12] "Dear Governor Egan:

With this letter we are enclosing a copy of proposed new federal regulations governing commercial fishing by Indians in Alaska, which we are submitting for early publication in the *Federal Register.*

These regulations are being proposed solely for the purpose of protecting fishing rights of the native people which have long been recognized by federal statutes, regulations, and customs, and which were secured to them by Section 4 of the Alaska Statehood Act of July 7, 1958. We shall welcome any comments the State of Alaska has to offer concerning these proposed regulations.

Sincerely yours,

FRED A. SEATON,
Secretary of the Interior".

ministration of a conservation program for migratory fish. 42% of the resident Alaskan fishermen are Indians.[13]

Appellants are 3 of 59 Indian corporations located throughout the State.[14] Approximately *12%* of the citizens of Alaska are indigenous,[15] and *15%* of the first State legislature is composed of natives [16] elected prior to this fishing controversy. The President of the State Senate, Senator Baltz, is an Eskimo. State representative Andrew Hope, an Indian, was elected by the members of Appellant corporation Angoon and others in Election District No. 4. State Senator Frank Peratrovich, an Indian from Klawock,[17] was elected from the *Southeastern District* of Alaska at large by the members of all three of the Appellant corporations and others.[18] *This District* is composed of *78.3% whites* and *21.7% indigenous* persons. (Appendix 5)

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[13] The 1950 census indicates that of a total of 3,121 Alaskans employed in the fishing industry in all of Alaska, 1,804 are white, and 1,317 are non-whites. U. S. Bureau of the Census. U. S. Census of population: 1950, Vol. II, characteristics of the population, Part 51, Alaska. U. S. Government Printing Office, Washington, D. C. 1952—Table 20, 51-24. See also Appendix 5.

[14] COHEN, FEDERAL INDIAN LAW (revised by the Department of Interior, 1958) 962, at note 14).

[15] THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES TO THE U. S. COMMISSION ON CIVIL RIGHTS, 1959 (Govt. Printing Office, 1960) at page 48, *et seq.* contains a report on Alaska. According to this Report, there are 300,000 whites, 37,000 natives and 8,000 Negroes in Alaska. Therefore, 12% of the population is indigenous. According to Appendix 5, 19% of the population in 1956 were natives.

[16] The State legislature is composed of 60 members of which 9 are natives. Many more are married to natives.

[17] According to COHEN, *op. cit., supra*, note 15 at 962, an Indian corporation organized under the same law as these Appellants was chartered in Klawock in 1939.

[18] These facts are of course common knowledge in Alaska.

Appellant Metlakatla alleged in paragraph 15 of its Complaint

> "That in recent weeks public interest in the controversy has mounted. Isolated outbreaks of violence have already taken place and it is feared that if the situation is allowed to continue without a determination of the rights of the parties immediately that violence will increase." (R. 15)[19]

In Southeast Alaska prior to statehood 113 to 262 fish traps were operated (R. 41), the abolition of which caused financial hardship. (R. 49, 61)

SUMMARY OF ARGUMENT

In the Statehood compact, Congress and the State intended to preserve the status quo of certain Indian fishing rights. These Appellants cannot show:

(a) That there ever was an Indian fishing right to a particular fish trap site in the commercial fishery;

(b) That this right existed prior to Statehood and therefore is the status quo that Congress preserved;

(c) That the racial equality in the use of the commercial fishery which existed prior to Statehood was destroyed even though Congress intended to preserve the status quo;

(d) That these Appellants hold tribal Indian rights and are entitled to claim a special privilege (if any is found to exist).

Even if Appellants were to prevail on the foregoing points, the "equal-footing doctrine" prohibits dis-

[19] Justice Brennan inadvertently attributed this allegation to the State Attorney General. This issue was raised by Appellant Matlakatla (R. 15). No similar allegation has been made by the State.

crimination against the State of Alaska in the control of its fish and game as well as its inland waters.

In the organization of our Brief, the general law is stated and then applied to the special circumstances of each Appellant.

I

To determine the status quo preserved, it is necessary to ascertain the rights held by the Appellants prior to Statehood. The courts have unanimously held that although a *fish trap* and a fishing boat are property, no one can own a *fishing site* for traps nor a fishing area for boats. A *fishing site* cannot be acquired by prescriptive use or by purchase, and prior to Statehood such a site could not be given to Alaskan natives by the Secretary of Interior. Both natives and whites had an equal opportunity to use the *fishing sites* claimed by Kake and Angoon. The rule has always been that the first in time to occupy a site for a fishing season was first in right to the continued occupancy for that *single season.* No right carried over from year to year.

Kake and Angoon corporations purchased fish traps less than 13 years ago from white vendors—a *fishing site* was not susceptible to ownership.

Members of Appellant corporation (Metlakatla) may have an exclusive right to fish a given area but they have always been bound by the general fishery regulations and conservation laws when the United States exercised the municipal jurisdiction which is now exercised by the State. Metlakatla possibly still retains the *exclusive use* of an area. We contest its right to the *unregulated use* of a migratory resource when that resource passes through the Metlakatlan area. Under the status quo which was preserved, Metlakatla

never had an *unregulated use* and was never excepted from the general conservation laws.

II

Section 4 of the Statehood Act preserved the status quo. Congress was not certain whether Indian fishing rights did exist and therefore intended to preserve such rights, if any, by leaving the matter to future legislative or judicial determination. This was not a grant by Congress. Similarly, there was not a grant by the State for the State could not disclaim a right which had never existed.

In construing the bilateral statehood compact, the intent of both parties must be considered. The State Constitution and the state laws as determined by the State Court contemplated racial equality (status quo) in the common commercial fishery. Similarly, the organic and state law contemplated the abolition of the use of traps, without exception, pursuant to a State constitutional ordinance which was voted upon and approved by the members of Appellant corporations. Can it be said that the members of Appellant corporations voted overwhelmingly to pass a constitutional ordinance which would apply to whites—because the State would have no jurisdiction over its citizens of Indian blood? We think not. Everyone who participates in the law making process is bound by the law which is established despite race, and this is true even though it is financially unpleasant. The native fishermen of Alaska (who constitute 42% of the Alaskans in the fishing industry) led the long over-due reform movement for the abolition of fish traps. They are bound by the result.

The Omnibus Act was a unilateral amendment to the Statehood compact. It was not intended by Congress to operate to the detriment of the State nor could it so operate. It has no bearing on this litigation.

III

The reservation of exclusive Federal "jurisdiction and control" within an area of inland waters held in trust for the State must be geographically ascertainable. The demarcation line of State-Federal criminal and civil jurisdiction must be more certain than that existing in the reservation for Metlakatla of "surrounding waters." The question is: how much surrounding water? The Presidential Proclamation providing for a 3000 foot exclusive fishing area has not been accepted by this Court. The term "surrounding waters" was sufficient when the United States held both municipal and Federal jurisdiction, but now, for a line of demarcation, only the language of the Statute defining the Metlakatla reservation as a "body of lands" can be used. The reservation of waters is vague and indefinite and has fallen. "The reservation was not in the nature of a grant but simply a setting apart until otherwise provided by law." The contingency anticipated by this Court occurred when municipal jurisdiction devolved upon the State.

IV

Native blood (racial origin), alone, is not recognized as a basis for a dual set of laws and the exemption of citizens of native blood from a State law and Constitution which they helped to write. The federal power is based on the Commerce Clause and applies only when persons of Indian blood are *tribal*. Appellant Met-

lakatla has pleaded no tribal organization, has for many years exercised full political rights, has lived under and in accordance with Territorial and State law, and has participated fully in the life and economy of the greater Alaskan community. The grade and high schools of all three communities are State operated.

Members of the Kake and Angoon corporations exercise full political rights, and neither they nor the fish traps sites they claim are on an Indian reservation. Angoon was incorporated many years ago as a State (then Territorial) municipal corporation. The community of Kake was incorporated in 1952 and now exists under State law as a first class city. If tribal government or organization ever existed, it has been relinquished in favor of the State law of municipal corporations. The fact that Appellants are 3 of the 59 Federal Indian corporations organized in Alaska for commercial purposes is not sufficient to exempt them from State law governing the commercial fishery of Alaska. An arm of the Federal Government may properly assist needy Indians or Indian corporations by loan programs and otherwise. However, it cannot reconstitute them as "Indian tribes" in order to make a welfare program out of Alaska's fishery. This has been previously attempted and this Court held at that time that the common fishery of Alaska could not be so used. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86.

V

The equal-footing doctrine contemplates a Union of equal states. If there has been discrimination against the State of Alaska by withholding control of fish and game, and control of inland waters and jurisdiction over its citizens purely on the basis of racial origin, then such discrimination is unconstitutional.

ARGUMENT

I

THE STATEHOOD ACT PRESERVED A STATUS QUO UNDER WHICH NO INDIVIDUAL OR GROUP, NATIVE OR WHITE, EVER HAD A "FISHING RIGHT" TO OPERATE A FISH TRAP AT A PARTICULAR SITE. ALL FISHED AS EQUALS.

A. Statement of the General Law

It is impossible by a disclaimer to create a right which never existed.

Two principles are firmly established in the Alaska fishery law: (1) there is no exclusive right or privilege to the common fishery, and (2) first in time is first in right to fish a particular site. Traditionally, it has been household law in Alaska known to everyone that no one had a right to a fish trap [1]—conversely, everyone had a right to every fish trap site. This was understood by the people of Alaska as being the fundamental rule of their largest industry, and this rule has been judicially stated in the courts time and time again.

In 1916 in the case of *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538 (D. C. Alaska, 3d Div., 1916), the court observed that a fish trap is destroyed if left in position during the winter months,[2] leaving no continuing right from year to year, and held that:

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[1] For descriptions of fish traps see *P. E. Harris & Co.* v. *Mullaney*, 12 Alaska 476, 479-80, 87 F. Supp. 248, 249 (1949); *Columbia Salmon Co.* v. *Berg*, 5 Alaska 538, 544 (D.C. Alaska, 3d Div., 1916); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87; GRUENING, STATE OF ALASKA 170, 171 (1954).

[2] See also *Thlinket Packing Co.* v. *Harris & Co.*, 5 Alaska 471, 500 (D.C. Alaska, 1st Div., 1916).

"Regardless then of the former ownership or claim of ownership to this fish trap site, the defendant seems to have been *first in point of time in entering upon and taking physical possession* of this fish trap site, and was exercising such diligence in the erection and construction of the same as entitled him to be undisturbed therein, . . ."[3] (Emphasis added)

Twenty years of prior usage of a particular site gave no right which carried over from year to year,[4] because no right could be acquired prior to the specified opening day and hour of the season.[5]

The principle of first in time is first in right does not yield even in the face of substantial monitary loss. In *General Fish Company* v. *Markley,* 13 Alaska 700, 105 F. Supp. 968 (D.C. Alaska, 3d Div., 1952), the court held that even though $20,000 was paid for a trap site in 1946, the purchaser could not protect himself from one who first took possession of the site for the 1952 fishing season. A *fish trap site* cannot be purchased. A *fish trap* can be purchased.

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[3]The possession of a War Department permit gives no right other than to obstruct navigation. *Thlinket Packing Co.* v. *Harris & Co., supra* note 2; *Alitak Packing Co.* v. *Alaska Packers' Assn.,* 6 Alaska 277 (D.C. Alaska, 3d Div., 1920); *General Fish Co.* v. *Markley,* 13 Alaska 700, 105 F. Supp. 968 (D.C. Alaska, 3d Div., 1952).

[4]*Fisher* v. *Everett,* 11 Alaska 1, 66 F. Supp. 540, 542 (D.C. Alaska, 3d Div., 1945). This case reviews the complete line of authority establishing the doctrine that first in time is first in right, 66 F. Supp. at 550.

[5]*Canoe Pass Packing Co.* v. *United States,* 270 Fed. 533, 5 Alaska Fed. 25 (9th Cir. 1921).

The absence of a right in *General Fish* is strikingly similar to the absence of a right in Angoon and Kake, who likewise claim to have purchased fish trap sites in 1948 and 1950 respectively (R. 83, 102-3) from non-Indian vendors.

It is truly a race. In *Snug Harbor Packing Co.* v. *Miller,* 15 Alaska 111, 123 F. Supp. 150 (D.C. Alaska, 3d Div., 1954), the court held that a trap won the right to fish because its apron was raised and it therefore started fishing before the defendants could get the motor on their skiff started.

Not only could fish trap sites not be acquired by the Indian corporations by purchase, but the right to an exclusive fishery could not be given to Alaskan Indians by the Secretary of the Interior according to *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86.

The statutory basis for this decision was the White Act of 1924[6] which granted to the Secretary of Commerce (now Interior) the power to regulate the fisheries of Alaska. The Act contains the following language:

> "Provided, that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that *no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right* to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior." 48 U.S.C. § 222 (Emphasis added.)[7]

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[6] 44 Stat. 752, 48 U.S.C. § 221 *et seq.*

[7] During the hearings on the White Act, Alaska's delegate to Congress submitted a resume of the fishery laws of the World

Pursuant to the statutory mandate the trap sites fished by Appellants in 1959 and claimed by them can be found listed among those permitted generally in the area involved in 1958 under regulations by the Secretary. Sites were not designated as belonging to a particular person,[8] group or Indian village. (R. 101, 115) The regulations merely stated that a trap or traps would be permitted in a certain area.[9] Frequently, only one trap could be operated at each of said points because of the further regulations that traps had to be not less than a mile or a mile and a half apart.

Many arguments can be made as to whether the Alaska constitutional ban against fish traps is a conservation measure. Ordinance No. 3 of the State Constitution which bans fish traps recites among other things that the abolition of fish traps is to

> "... conserve the rapidly dwindling supply of salmon in Alaska ...."

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and of the States of the Union in support of the virtually universal principle that the public right in the common fishery cannot be granted away. *House Committee Hearings of 1924*, Vol. 346, 123-136.

[8] The Attorney General of the United States has said:

> ". . . The limiting of the number of trap sites and of the amount of fish that may be taken by means of traps are ordinary conservation measures and within the authority conferred by the statute. On the other hand, it does not appear that any provision of the statute can reasonably be construed as authorizing the allocation of trap sites to particular individuals." 40 Ops. Att'y Gen. 175, Attorney General Francis Biddle, April 8, 1952.

[9] Appendix 6 traces the federal regulations back to 1945 and shows how until 1958 trap sites and trap fishing areas were permitted by general regulations and not identified by ownership or race.

B. The Members of the Metlakatla Corporation (Most of Whom Are Not Alaskan Aboriginals but All of Whom Are Citizens of the State) May Have the Right to Fish an Area Exclusively Yet They Have Always Been Bound by the General Fishery Regulations and Conservation Laws When the United States Exercised the Municipal Jurisdiction Which Is Now Exercised by the State.

Appellant Metlakatla has never had an unregulated right to fish and is bound by the general fisheries laws even though it may have a right pursuant to a statutory reservation and a Presidential Proclamation to exclusively fish a particular area.

The Metlakatla Indians emigrated from Canada to the Annette Islands in 1887. Their complaint makes no claim to aboriginal rights[1] which were disclaimed as a condition of entry into the United States. *U.S.* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (1958). Congress created a reservation for them. 26 Stat. 1095, Section 15 (1891). In 1916 President Wilson by proclamation apparently extended their reservation from merely the "body of lands known as Annette Islands" to include 3,000 feet of the surrounding waters.[2]

This proclamation provided that the waters were to be used by them under the *general fisheries laws and regulations.* As we have shown, no particular fishing

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[1] As a matter of fact, the Court of Claims in *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452, 468 (1959), has determined that aboriginals of Southeastern Alaska, the Tlingits and the Haidas, are entitled to compensation for 86,740 acres consisting of the Annette Island reservation. In other words, the United States is now in the process of compensating Alaska aboriginals for what it took from them and gave to the Metlakatlans.

[2] Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

sites could be assigned to individuals under the White Act.[3] The fisheries of the Territory were governed by a single Act, a single set of regulations (so far as is important here) and the only legitimate interest the Secretary could have had under the general fisheries law was conservation. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 122. The rules of conservation and methods of taking fish, the opening and closing of seasons, and all other aspects of commercial fishing regulations were general. Any regulatory conservation scheme governing migratory game must have general application or fail. We have the factual situation of *Missouri* v. *Holland*, 252 U.S. 416, with the Metlakatla reservation being Missouri.

When President Wilson extended the reservation into the surrounding waters, the proclamation reflected his appreciation of this principle. The meaning, therefore, of the proclamation is that the Metlakatlans shall fish within the framework of the general scheme of fisheries laws of the United States and be bound by the unpleasant duty of sharing the burden of conservation whether it be by abstention for certain periods, limitations on gear, or otherwise. It is for this reason that historically the Secretary of Interior's regulations did not segregate the Metlakatlans or their reservation from the general conservation scheme for migratory salmon contemplated by the White Act.[4]

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[3] 44 Stat. 752, 48 U.S.C. § 221 *et seq.*

[4] Appendix 6 gives citations to fishing regulations of the Department of Interior from 1945 to date showing how the traps of Metlakatla were merely several among many permitted in the Clarence Strait District until the 1959 regulations which caused this litigation. Appendix 7 shows which trap sites were actually fished since 1945.

Appellant Metlakatla at most has an easement or profit à prendre and can in no event have any greater right than the Seneca Indians as recognized by this Court in *Kennedy* v. *Becker,* 241 U.S. 556, where it was held that the ownership of an easement or a profit à prendre to fish a particular area did not deprive the state of its police powers to regulate the taking of fish and game. In *Dow* v. *Ickes,* 123 F. 2d 909, 914 (D.C. Cir. 1941), *cert. denied* 315 U.S. 807, *rehearing denied* 315 U.S. 830, the court said:

> ". . . taking of herring could be permitted, of salmon prohibited. Use of seines and boats with nets could be allowed, that of dynamite and traps prohibited. . . ."

The import of the holding is that the type of gear, the location of gear, and all aspects of the methods and means of taking fish in Alaska waters were within the discretion of the Secretary and could be altered from year to year as he determined for purposes of conservation.

A resource, which by its nature must be vigorously conserved or destroyed, cannot be subjected to dual regulations. The inevitable result is destruction. Commenting on the fisheries of Alaska, the Court in the *Dow* case, *supra* at 914-15, said that the White Act

> ". . . comprehends all commercial fishing in Alaskan waters, not merely fishing for salmon by trap. *They relate to a broad, inclusive and co-ordinated scheme. Effective control in particular respects amounts to nothing towards achieving conservation unless the scheme as a whole works to that end."* (Emphasis added)

Arguments have been made that a dead fish is a dead fish whether it is caught by nets, lines, or traps.

The mayor of Metlakatla has conceded:

> ". . . that the purpose in seeking ban on the use of fish traps in Alaska was to conserve the runs of salmon." (R. 37)

But the mayor says further,

> ". . . that the use and operation of the four fish traps of the community will but in a very minor manner, if any, affect the conservation of salmon in Alaska waters."

We agree with the mayor of Metlakatla that the ban on fish traps is a conservation measure. We cannot agree with the argument that although all other fish traps in Alaska should be banned for conservation purposes, those of Metlakatla should not. The objection to fish traps in Alaska is their excessive efficiency.[5] "Excessive efficiency" was the same objection recognized by the court in describing purse seines in *Corsa* v. *Tawes,* 149 F. Supp. 771, 773 (1957), *affirmed on appeal,* 355 U.S. 37.

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[5] This was vividly described in 1924 by Alaska's delegate to Congress Sutherland as follows:

> ". . . when the fish are congregated in one body moving toward the parent stream if by accident they come in contact with a trap lead and the lead fish enters the trap it is more than probable that the entire supply of that stream to the last fish is taken, and therefore a great many of the smaller streams in Alaska are barren of fish, and any number of men in Alaska will tell you by the method of the trap the entire supply is exterminated." *Congressional Record—House,* April 9, 1924, at 5966.

Appellant Metlakatla claims an exclusive fishing area extending 3,000 feet seaward from the shoreline of the Annette reservation pursuant to Presidential Proclamation which provided that these waters were

> "... to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce."[6]

The sense of this Proclamation was that Metlakatla should not be excepted from the operation of the general fisheries laws which were administered by the United States in its capacity to exercise municipal jurisdiction in a territory. Metlakatla may have a fishing reserve —exclusive perhaps, unrestricted or divided, no.[7] This jurisdiction has devolved upon the State of Alaska.

This Court in *Alaska Pacific Fisheries, supra,* stated, as to the Metlakatla reservation, that not only the uplands but also the adjacent waters and submerged lands

> "... were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority.

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[6] We assume for the purposes of this argument that the Presidential Proclamation (Proclamation No. 1332, April 28, 1916, 39 Stat. 1777) is valid. As will be shown in Argument III, *infra*, the Presidential Proclamation was not dignified by this Court in *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78 when *that issue* was raised.

[7] By restricted, we mean released from the general state conservation laws which apply to migratory fish before they go into reservation waters, and after they come out. By divided, we mean a division of authority.

(cases cited) The reservation was not in the nature of a private grant, but simply a setting apart, 'until otherwise provided by law,' . . ." (case cited).

Thus, the United States held at that time the municipal powers to regulate fisheries, tidelands, and inland waters which are now within the jurisdiction of the State of Alaska.[8]

Under the Westland Proviso in Section 6(e) of the Statehood Act, 72 Stat. 339 (1958), the general control of Alaska fisheries has passed to the new state.[9]

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[8] The exercise of municipal powers by the United States has been repeatedly observed by the Ninth Circuit Court of Appeals, *Alaska Pacific Fisheries* v. *United States*, 240 Fed. 274 (9th Cir. 1917). In discussing the Metlakatla waters the Court stated:

"The jurisdiction exercised by the Commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and . . . the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish trap within the waters reserved by the President's Proclamation . . ." 240 Fed. at 285.

[9] We have submitted the foregoing argument at this stage in our Brief because we think it constitutes the most limited ground upon which this Court may honor the Alaska State Constitution and its prohibition against fish traps.

C. The Kake and Angoon Corporations (the Members of Which Are Alaskan Aboriginals, Are Ordinary State Citizens and Are Not Located on an Indian Reservation) Purchased Fish Traps (Not Fishing Sites) Less than 13 Years Ago and Operated the Devices Under Fisheries Laws Which Gave Every Citizen the Same Right to Fish a Particular Site Each Year.

Kake and Angoon have never had any special privilege or right based on race.

Although Appellants Kake and Angoon have pleaded no Indian reservation, no aboriginal rights, and no long-standing custom and usage, the briefs of Appellants indicate reliance on these points. In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 285, this Court held *that as of 1955* no aboriginal property rights had been recognized by Congress and said:

> "We have carefully examined these statutes [1] and the pertinent history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken." (footnote added) 348 U.S. at 278.[2]

Because the fishery of Alaska has been open to all citizens alike with no special privilege for Indians, the Indians lost the exclusive right of a fishery which was exclusively theirs before the coming of the white man.

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[1] Act of May 17, 1884, 23 Stat. 24; Act of June 6, 1900, 31 Stat. 321.

[2] See also *United States* v. *10,950 Acres of Land in Juneau,* 11 Alaska 518, 75 F. Supp. 841 (D.C. Alaska, 3d Div., 1948).

As was observed in *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452 (Ct. Cl. 1959), in 1885 a report concerning the Indians of Alaska was made and the court observed:

> "... The Report did not recommend that preserving to the Indians of areas traditionally used for hunting, fishing, and gathering it being assumed that these areas would be opened for white settlement and exploitation. ..."

As a result, the court found:

> "... The most valuable asset *lost* to these Indians was their fishing rights in the areas they once used and occupied to the exclusion of all others ..." (Emphasis added) 177 F. Supp. at 468.

It is just as impossible to return to the Indians the fishery of Alaska as it is impossible to return to them the State of Kansas, although both were once exclusively theirs. Recognition of this is found in the jurisdictional act giving rise to the *Tlingit and Haida* case, *supra,* where monetary compensation is recognized as the only avenue by which justice can be done.[3]

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[3] The United States Court of Claims has ruled that aboriginals may receive compensation for their lost rights pursuant to a jurisdictional act of June 19, 1935, 49 Stat. 388. *Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452 (Ct. Cl., 1959). The claim of the Indians involves practically the whole of southeastern Alaska. It includes the uplands adjacent to the fish traps under consideration, because these are a part of the Tongass National Forest. (R. 83, 103) As previously noted, it also includes the Metlakatla reservation. The claim of the Indians is that the Metlakatla reservation and the Tongass National Forest have been taken from them by the United States and that they are entitled to compensation for the same.

As we have shown earlier, the rights to fish a particular fish trap site did not carry over from year to year. It was a perennial race, if anyone wanted to attempt to acquire a site which had previously been fished by another. In 1958, the last fishing season prior to statehood, every citizen of the United States had an equal right to the fish trap sites claimed by Kake and Angoon provided he wished to incur the tremendous expenditure of constructing and placing the traps and running the risk that if he were not first in time, he would not be first in right.[4] When Alaska was admitted into the Union on January 3, 1959, the Appellants Kake and Angoon had absolutely no right to the traps they fished in 1958, because until they took possession of the sites for purposes of fishing in the spring of 1959, they did not have a possessory right which a court could recognize. The Secretary of the Interior by regulations in 1959 *after statehood* attempted for the first time to give to Kake and Angoon the right to place a fish trap regardless of whether they took possession of the site first or last. This was not a right which carried over from territorial days.

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[4] Appendix 6 gives citations to the federal regulations opening areas generally to fish traps and closing other areas. Particular areas or sites are not identified as belonging to anyone. See Appendix 7 as to fish trap locations actually fished by Appellants Kake and Angoon or their predecessors since 1945.

II

CONGRESS HAS NEVER RECOGNIZED INDIAN FISHING RIGHTS. THE STATEHOOD ACT PRESERVED THE STATUS QUO WHICH WAS THE EQUALITY OF ALL CITIZENS. THERE WAS A DISCLAIMER OF STATE JURISDICTION OVER INDIAN PROPERTY, NOT ORDINARY CITIZENS OF INDIAN BLOOD WHEN FISHING.

Congress in Section 4 of the Statehood Act was careful to prevent any express or implied loss or grant of Indian property rights as a result of Alaska's admission into the Union on an "equal footing." Throughout the legislative history of Alaskan statehood bills, the Congressional Committee reports consistently expressed an intent to (1) make no determination of aboriginal rights in Statehood legislation, and (2) to maintain the "status quo" for future legislative action or judicial determination.

Suitable emphasis should therefore be placed upon the words "property" and upon "status quo" in the quotations from the legislative history, *infra*. Above all, it must be noted that Alaska has not, in disclaiming Indian *property* rights which may have been vested on the date of its admission into the Union, disclaimed the right to regulate commercial fishing, such right being one of a political nature and not a property right.

In 1947, the first statehood bill, H. R. 5666, required that the State disclaim right and title to Indian property.[1]

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[1] "Second. That said State and its people do agree and declare that they forever disclaim all right and title to . . . all lands lying with its boundaries owned or held by any Indian, Aleut, or Eskimo, hereinafter called native, or by any native tribes the right or title to which shall have been acquired through or from the

The basic intent of Section 2 of H. R. 5666 was to preserve native property rights—not to add or subtract from them but rather to leave the question to future legislative action or judicial determination.[2]

Language similar to H. R. 5666, *supra*, was contained in a subsequent statehood bill and a similar intent to maintain the status quo was expressed.[3] The Senate of the 81st Congress added the parenthetical phrase "(including fishing rights)"[4] and a Senate report observed:

> "The new State would have the same control over the invaluable fisheries and wildlife within its borders as do other States of the Union, subject only to the limitations of *international agreements*, such as that affecting seals and native rights to fish and wildlife.[5] (Emphasis added)

The foregoing report does not provide a basis for the assertion that the State was "deprived of any con-

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United States or any prior sovereignty, and that until the title of the United States or of such native or native tribes shall have been disposed of or extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . ."

[2] ". . . As proposed to be amended this paragraph would preserve all existing valid native *property rights* in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection, or relinquishment of native *property rights* in Alaska. *It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo.* H. R. Rep. No. 1731, 80th Cong. 2d Sess. 31 (1948). (Emphasis added)

[3] H.R. 331, 81st Cong., 1st Sess. (1949); H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

[4] S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950).

[5] Id. at 11.

trol over native fishing" (M. Br. 34) because Appellant has not and cannot cite any *international agreement* applicable to this case. For examples of international agreements pertaining to native fishing and hunting, see COHEN, FEDERAL INDIAN LAW (revised by the U.S. Department of Interior, 1958) 946, 947.

Properly, the intent of Congress has consistently been to avoid granting any new native rights or denying any old rights in statehood legislation. Section 203(2) of H. R. 2535, 84th Cong., 1st Sess., contains language similar in all important respects to the language which finally became Section 4 of Public Law 85-508, 72 Stat. 339 (1958) [6] the Committee Report stated the following:

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[6] For convenience and so that a ready comparison can be made, Section 203(2) of H.R. 2535, 84th Cong., 1st Sess., is contained below with brackets indicating material deleted and italics indicating material added by Section 4 of Public Law 85-508, 72 Stat. 339 (1958):

> "*As a compact with the United States* [That] said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or its subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee

"Second. The State and its people disclaim all rights and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of the enabling act. Said disclaimer clause is to apply where the right or title in such property (including fishing rights) is either held by or subject to disposition by the United States. *It is provided that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination.*" (Emphasis added) H. R. Rep. No. 88, 84th Cong., 1st Sess., 47.

The Committee report [7] relied upon by the 85th Congress when it enacted the Statehood Bill [8] found in regard to Section 4 of that Act:

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without restrictions on alienation: [and] *Provided, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: And provided further,* That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation."

[7] H. R. Rep. No. 624, 85th Cong., 1st Sess. 19.

[8] Public Law 85-508, 72 Stat. 339 (1958).

"Finally the section provides that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination." (Emphasis added)

The Secretary of Interior construes "status quo" to mean the continued fishing by natives as it existed the "instant before statehood" and that he therefore cannot enlarge or diminish native fishing despite conservation requirements—now or in the future. That is, he cannot regulate Indians fishing and takes the further position that the state cannot regulate the activity. (See, Solicitor General's Brief 38) The Justice Department construes "status quo" to mean that the Secretary of Interior can regulate Indian fishing to the exclusion of the State. The State construes "status quo" to mean that there is no exclusive right or franchise to the common fishery and that it is open to all United States citizens regardless of race—as it always has been.

Clearly, the intent of Congress was to maintain the *status quo*. If the actual language of Section 4 is ambiguous, then under the rule of *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, the Act will be construed against the granting away of the public fishery for this Court said:

> "It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fishery permanently from public control . . ."
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> * * * * * * *
>
> ". . . If that power were broad enough to enable the Secretary to designate non-revocable or perma-

> nent reservations of all Alaska fishing grounds for the *sole benefit of natives living in villages and adjacent to the fisheries,* it might place in his hands the power to grant the natives the right to exclude all other fishermen from the fisheries." 337 U.S. at 104-105. (Emphasis added)

Mere legislative innuendo is not enough.

> ". . . Such references to general legislation on public lands in the huge Territory of Alaska, however, cannot be treated as an adequate basis for courts to declare that power was given the Secretary of the Interior to dispose finally of Alaska lands . . . " 337 U.S. at 109.

A. In the Bilateral Statehood Compact the People of the State and Its Constitution Contemplated Equality of All Citizens and No Fish Traps.

In construing a bilateral compact, the intent of both parties must be considered. The State Constitution contemplated that the *status quo* of native fishing rights would be preserved.[1] The court below ruled that insofar as state law is concerned there was no cession of jurisdiction and the constitutional ban in regard to fish traps applied to all who enjoyed and used the common fishery.

Article XII, Section 12 of the Alaska Constitution contains a disclaimer of native fishing rights "as that

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[1] Appendix 8, Record, 64th day, January 25, 1956, Alaska Constitutional Convention shows that the Convention Committee proposal No. 16 was taken from the language of H. R. 2535 (*supra*, at note 6) of the 84th Cong., 1st Sess., which as we have shown contemplated the maintenance of the *status quo*.

right or title is defined in the act of admission."[2] No such definition exists in the act of admission or elsewhere.[3] The constitutional ban on fish traps is most

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[2] ARTICLE XII, SECTION 12, CONSTITUTION OF THE STATE OF ALASKA:

"The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, *as that right or title is defined in the act of admission.* The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation." (Emphasis added)

[3] The *only* specific reservations of exclusive jurisdiction to the United States are found in Sections 10 and 11 of the Alaska Statehood Act, 72 Stat. 339 (1958). Section 10 provides in part as follows:

> "(c) Effective upon the issuance of such Executive order or proclamation, exclusive jurisdiction over all special national defense withdrawals established under this section is hereby reserved to the United States which shall have sole legislative, judicial, and executive power within such withdrawals. . . ."

Section 11, reserving exclusive jurisdiction in the federal government over Mt. McKinley National Park, provides in part as follows:

> "(a) Nothing in this Act shall affect the establishment, or the right, ownership, and authority of the United States in Mt. McKinley National Park, as now or hereafter constituted; but exclusive jurisdiction, in all cases, shall be exercised by the United States for the National Park: . . ."

specific[4]—it pertains to only one of the many types of fishing gear. The disclaimer contained in Article XII, Section 12 of the State Constitution[5] is most general in its application as is Section 4 of the Enabling Act. Ordinance No. 3 (banning fish traps) and Article VIII, Section 15 of the State Constitution which provides that:

> "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

were "accepted, ratified and confirmed" by Congress.[6]

The lower court judge (who held his position under appointment, not by the State, but by the President of the United States) understood the economy of Alaska and accordingly took judicial notice of the rapid depletion of the salmon runs (R. 61), the decision of the people of Alaska to abolish fish traps (R. 61), and the vote by these Appellants for the abolition of fish traps (R. 60).[7]

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[4] "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State." ORDINANCE 3, ALASKA CONSTITUTION.

[5] See *supra* at page 33, note 2.

[6] Alaska Statehood Act, Section 1, 72 Stat. 339 (1958).

[7] The Alaska Native Brotherhood, after these Appellants had operated fish traps in 1959, passed a resolution opposing the traps—the only traps in Alaska. See Statement of the Case, *supra* at page 5, note 9. A graphic and accurate description of the feelings of the people of Alaska is contained in GRUENING, STATE OF ALASKA (1954).

B. The Unilateral Amendment of the Compact by Congress Was Not Intended and Cannot Operate to the Detriment of the State.

The Omnibus Act does not affect this litigation.[1] Section 4 as it was ratified by the people of the State provided essentially a disclaimer of undefined property rights (including undefined fishing rights) and appar-

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In discussing legislation pending before Congress in the late 1940's, GRUENING recounts as follows (pages 397-399):

"Ralph J. Rivers, Attorney General of Alaska, voiced the prevailing Alaskan opposition 'to enactment of S. 1446 or any similar measure which *would establish a vested interest in fish-trap sites* and hereby in effect award to a favored few a major share of a natural resource which should be available to all.'

"Most striking was the unanimity of protest from the native communities of southeastern Alaska to which it had been the Interior Department's purpose to allocate some of the surrendered traps. From Klawock, the *President of the Alaska Native Brotherhood*, Frank Peratrovich, wrote:

" 'It is recognized by the people of Alaska . . . this bill is the canned-salmon industry's bill. It is being pushed . . . by the powerful lobbyists of the industry . . . to legalize their methods of completely depleting our major resource of the territory. When this is accomplished they will move to greener pastures . . . and we, the people of the territory, will be left to carry on.

" 'Through a period of fifteen years the fishermen and residents . . . have come to realize that the fish trap must be completely eliminated if we are to maintain an average run of salmon and the agitation against the trap has increased within the past four years due to the fact that the decline in the run of salmon is directly traceable to this method of taking salmon. If this bill is allowed to pass, maybe the government will be willing to give Alaska to the Indians after the industry gets through with it. I hope this does not happen.'

"The *President of the Alaska Native Sisterhood*, Mrs. Amy Hollingstad of Petersburg, and the presidents and secretaries of

[Footnote 1 on Page 36]

ently disclaimed "absolute jurisdiction and control" only over lands and other property. Noticeably absent from the disclaimer of jurisdiction and control was the term "(including fishing rights)". Section 4 under analysis logically divides itself into two clauses: (a) a disclaimer of undefined property and fishing rights, and (b) a cession of "absolute jurisdiction and control." In clause (b) the blank bracket indicates a conspicuous absence of the phrase "(including fishing

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the A.N.B. and A.N.S. camps of Hydaburg, Ketchikan, Yakutat, *Angoon*, Haines, Juneau and Douglas all transmitted their opposition for the committee's record.

"No further action was taken on the bill.

"The referendum taken in Alaska the following October 12th resulted in a vote of 19,712 to 2,624 for trap abolition. It was a demonstration that the people of Alaska, and not merely the fishermen, were against fish traps. Of the 22,336 who had voted, 88.7 percent took that position. While the First and Third Divisions whose coasts harbored the fisheries gave the largest percentage vote against traps, the Second and Fourth, where there were no fish traps, returned majorities in excess of three to one and nine to one, respectively. Again it was impressively shown that the Tlingit and Haida communities—to whom the bestowal of traps had been held out earlier in the same year by the Department of the Interior in its advocacy of the fish-trap leasing bill—were nevertheless wholly opposed, as they had been ever since the introduction of traps, and voted against them overwhelmingly and in ratios exceeding the votes of white communities: *Angoon, forty-one to nine;* Hoonah, 106 to eleven; Hydaburg, eighty-one to three; *Kake, 123 to six;* Kasaan, twenty-nine to nothing; Klawock, eighty-four to four; Yakutat, forty-six to three. *Most striking of all was that Metlakatla with seven traps belonging to the community, voted 112 to thirty-three for trap abolition."* (Emphasis added)

[1]Alaska Omnibus Act, 73 Stat. 141 (1959). Section 2 of the Omnibus Act amended the language of Section 4, of the Statehood Act.

rights)". Section 4 provides in pertinent part, as follows:

> "As a compact with the United States said people do agree and declare;"
>
> [a] "that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives;"
>
> [b] "that all such lands or other property [ ], belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . " (Brackets added)

If it was intended that the people of Alaska as a condition of entry into the Union cede control of their major resource, then in all fairness the parenthetical phrase "(including fishing rights)" should have been inserted in clause [b].

The addition made by the Omnibus Act of the parenthetical clause "(including fishing rights)" to clause [b] *after* ratification by the people of Alaska cannot operate as a cession of jurisdiction and control over the fishery. A bilateral compact between the State and

the United States cannot be amended unilaterally to the detriment of a non-consenting party.[2]

However, Congress did not intend to amend the Statehood Act to the detriment of the State. Senate and House-Interior Committee reports[3] stated that the purpose of the amendment was to clarify an ambiguity and to clarify State jurisdiction over the general public domain. The insertion of the phrase "(including fishing rights)" in the process of accomplishing the above purpose gives no insight into the intent of Section 4 as *originally enacted* and *ratified* by the people of Alaska.

If it was the intent of Congress to deprive Alaska of control of the fishery and it was necessary to clarify ambiguous language in Section 4 as it originally was enacted to accomplish this purpose, then not only is this a unilateral amendment to the compact but it strengthens our interpretation that as *originally enacted* and *ratified* Section 4 could not work a cession of jurisdiction over Indians' fishing.[4]

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[2] *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P.2d 838, 842 (1946), appeal dismissed *sub. nom.*, *Boeing Aircraft Co.* v. *King County*, 330 U.S. 803, where the court said:

> ". . . However, after the state had accepted the terms of the enabling act by framing and passing a constitution, and Congress had approved the constitution, and the President of the United States had issued a proclamation to that effect, each government was bound by the provisions of *that* enabling Act." (Emphasis added)

[3] S. Rep. No. 331, 86th Cong., 1st Sess. 9 (1959); H. R. Rep. No. 369, 86th Cong., 1st Sess. 6 (1959).

[4] Section 6(e) indicated the intent of Congress to turn over to the State all Federal real and personal property used for the conservation and management of fish and wildlife except that used for research purposes. Congress did not contemplate that the

The refusal of Congress to dispose of the "unrivaled sea fisheries with their wealth of food" is based upon the "unarticulated premise" that the fisheries must be protected, improved and regulated "for the good of all our people."[5] The premise did not suddenly change when Alaska became a state. Alaska urges the same premise *today.*

III

STATEHOOD TRANSFERRED MUNICIPAL JURISDICTION OF INLAND WATERS TO THE STATE. A RESERVATION OF MUNICIPAL JURISDICTION IN THE U. S. MUST GEOGRAPHICALLY BE CERTAIN OR FALL.

All the waters in question are inland waters which were held in trust before statehood for the benefit of the future state and were not withheld from the State by ambiguous language or by implication.

Appellants have not contested the mixed findings of fact and conclusion of law by the lower court that the waters surrounding the islands which make up the Alexander Archipelago are inland waters of the State. (R. 67-69)[1] Truly such a finding cannot be disputed, for in fact southeastern Alaska is essentially an island empire. The salt water bays, inlets, and channels form the only means of surface transportation and communi-

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[1] For a description of the special geographic circumstances existing in Alaska, and the methods for determining seaward limits of inland waters, see *Pearcy, Measurement of the U.S. Territorial Sea,* Department of State Publication, No. 6879 (1959).

[*Footnote 4 continued*]

Federal government would retain management of the natives who constitute 42% of the Alaskans engaged in the fishing industry (*supra* at page 8, note 13) and therefore gave the state all the property previously used to manage the fishing activities of *all persons.*

[5] *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 106.

cation in the area. The principal cities, towns and villages of the area are not connected by road or trail. These waters contain, in the form of migratory salmon, not only the major industry of the whole of southeastern Alaska, but in many areas the only industry and practically all communities in the area are in effect fishing villages oriented to the marine way of life. (R. 68) This is true not only of the Indians in the area but also the whites.

United States v. *California,* 332 U.S. 19, and the subsequent Submerged Lands Act,[2] particularly the reservation of §1311(b) pertaining to Indians, have no effect in the present litigation due to the fact that this litigation involved inland waters as contrasted with the marginal sea.[3] *United States* v. *California, supra,* and the Submerged Lands Act, *supra,* arose from a relatively recent development in which lands located beneath the waters of the outer three-mile belt became important for purposes of mineral exploration and development.

The common right to fish in inland waters dates back to "King John's Great Charter."[4] The instant litigation concerns *sovereign rights* which have long been recognized in English and American law leading to a *sovereign duty* to maintain the fishery for the benefit of all the citizens, granting special privilege or franchise to none. There is no state in the Union where

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[2] 67 Stat. 30 (1953), 43 U.S.C. §§ 1311-1315 (1959).

[3] Appellants have failed to make the distinction between inland waters and the marginal sea. For example, Metlakatla erroneously urges at page 44 of its Brief that the Submerged Lands Act applies to inland waters.

[4] See Book II, Blackstone 764-765 (Jones ed. 1916).

this has more meaning than Alaska, where the largest natural resource industry is located in waters which bear an intimate relationship to the uplands. The principle is well established that a state has sovereignty over its tidelands and inland waters. Accordingly, denial of jurisdiction over tidelands and inland waters would deny a state that essential equality which is the basis of the Union.[5]

In discussing the case of *Manchester* v. *Massachusetts,* 139 U.S. 240, relative to the very waters under consideration, the Ninth Circuit Court of Appeals [6] observed that:

> "The jurisdiction exercised by the Commonwealth of Massachusetts over the waters of Buzzard's Bay is the jurisdiction which the United States has over the waters of Alaska; and, under the law as declared in the case just cited and in *Weber* v. *Harbor Commissioners, supra,* the appellants have acquired no rights, vested or otherwise, to construct or maintain a fish trap within the waters reserved by the President's proclamation. . . ."

On appeal this Court in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, reaffirmed the above ra-

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[5] *Martin* v. *Waddell,* 16 Pet. 367; *Pollard Lessee* v. *Hagen,* 3 How. 212; *Shively* v. *Bowlby,* 152 U.S. 1; *United States* v. *California,* 332 U.S. 19; *United States* v. *Louisiana,* 340 U.S. 899, enforcing 339 U.S. 699; *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65; *Escanaba Co.* v. *Chicago,* 107 U.S. 678; *United States* v. *Texas,* 339 U.S. 707.

[6] *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274, 281 (9th Cir. 1917) *affirmed* 248 U.S. 78.

tionale and stated that not only the uplands, but also the adjacent waters and submerged lands:

> "... were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank* v. *County of Yankton,* 101 U.S. 129, 133; *Shively* v. *Bowlby,* 152 U.S. 1, 47-48, 58; *United States* v. *Winans,* 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart *'until otherwise provided by law,'* . . . ." (Emphasis added) 248 U.S. at 87-88.

The contingency (spelled out by this Court in the *Alaska Pacific Fisheries* case, *supra,*) "until otherwise provided by law," has occurred. By *operation of law* the exclusive right to fish given to the Metlakatlans in a certain area by a questionable Presidential Proclamation has fallen due to the fact that municipal jurisdiction no longer rests in the federal government, but rather in the state.

If, however, this Court rejects the argument that the 3,000 foot Metlakatla reservation fell by *operation of law* then it can be shown that due to vague and indefinite geographical limits, the reservation cannot be sustained.

Jurisdiction, at least in a geographical sense, must be certain for as a fish or fisherman approaches the Annette Islands, the State cannot lose jurisdiction by degrees and the United States gain jurisdiction by degrees. At some point geographically, the fish and the fisherman must leave state jurisdiction and enter federal jurisdiction. The severity of penalties for vio-

lations of fisheries laws demonstrates the practical necessity of being able to ascertain the precise limits of state or federal jurisdiction. Thus, the term "surrounding waters" as used by this Court in the *Alaska Pacific Fisheries* case, *supra,* is insufficient.

The issue is therefore: What is the boundary of the Metlakatla reservation? The reservation was created in 1891 by Statute,[7] and was described as "the body of lands known as Annette Islands." In 1916, a Presidential Proclamation[8] purportedly extended the reservation to the "waters within three thousand feet from the shore lines at mean low tide . . ." and stated "Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the water described . . ." In *Alaska Pacific Fisheries* v. *United States,* 240 Fed. 274 (9th Cir. 1917) an injunction was brought by the United States against an intruder into the 3,000 foot area. The Ninth Circuit Court sustained the position of the United States on the grounds that the Presidential Proclamation was valid. In the same case (248 U.S. 78, 89) this Court apparently deemed the rationale of the Court of Appeals unacceptable, declined to dignify the Presidential Proclamation by mentioning it, and affirmed the Circuit Court stating that the *statutory reservation* describes "The body of lands known as Annette Islands" and that this description included the "surrounding waters."[9]

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[7] Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358.

[8] Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.

[9] In attempting to determine the boundaries of the Metlakatla reservation, the dicta cited by Appellant Metlakatla (M. Br. 26, 27) from *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 113-114 cannot

This geographical definition of the boundary may have been sufficient when the United States exercised *both* municipal and Federal sovereignty and therefore exercised "complete legislative authority" [10] over all the lands and waters. Appellee submits, however, that as a jurisdictional line of demarcation between state and federal authority, the term "surrounding waters" is clearly insufficient.

Terms such as "marginal sea", "outer belt", and "inland waters" have precise legal meaning. If one were speaking of a continent, the term "surrounding waters" would be equivalent to the terms "outer belt" or "marginal sea." However, in the case of the Annette Islands, a line of demarcation of Federal-State criminal jurisdiction is required for the purposes of executing the fishery laws. The term "surrounding waters" is totally inadequate. Therefore, this reservation of a portion of the waters of Alaska must fall with the advent of statehood because it is vague and indefinite.

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be of assistance. This Court in the *Hynes* case, *supra*, when speaking of the *Alaska Pacific Fisheries* case, *supra*, said:

> "This Court affirmed the decree as to the waters within 3,000 feet of the shorelines."

however, the Court in 337 U.S. at 113-114:

> ". . . felt compelled to decide the fisheries were included in the language of the Statute . . ."

which, of course, *is not 3,000 feet* but rather *"surrounding waters"* as determined by this Court when the question was squarely before it.

[10] *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87.

IV

RACIAL ORIGIN IS INSUFFICIENT TO BRING PERSONS OF INDIAN BLOOD UNDER THE COMMERCE CLAUSE.

The fundamental power of Congress extends only to tribal Indians—not to ordinary citizens of Indian blood.

Appellant Metlakatla makes no claim in their Complaint that it is today constituted as a tribe of Indians. The Appellants Kake and Angoon make no claim to an Indian reservation—either for their community—or the sites of the fish traps. All Appellants rely on the constitutional power of the United States to regulate commerce with Indian tribes. (M. Br. 41; R. 87, 107) The pleadings of Appellants show that they are Federal Indian corporations. (R. 5, 82, 102) This is not sufficient to invoke the operation of the Commerce Clause. Therefore, the question is:

> Assuming (a) that a property right exists to operate a fish trap, and assuming (b) that the effect of Section 4 is to reserve this right to certain natives of Alaska, then query: are these Appellants entitled to claim the special privileges of Section 4?

Members of Appellant Corporations are citizens of the State and the United States. They are subject to State law unless they can bring themselves within the federal power to deal with Indian tribes. A showing of racial origin is insufficient to achieve this.

Congress, during the territorial status of Alaska, had power over Alaskan Indians arising from the absolute authority to govern United States territories.

The advent of statehood leaves only the power to regulate commerce with the Indian tribes.[1]

The development of the law from *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, when Indian tribes were powerful "Indian Nations" to *United States* v. *Kagama*, 118 U.S. 375, when they were a "dependent people," calls for the application of the descriptive language of the *Kagama* case, *supra*, defining the power of the United States over the Indians under the Commerce Clause. In *United States* v. *Kagama*, *supra*, this Court said:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their *tribal relations;* not as States, not as Nations, not as possessed of the full attributes of sovereignty, *but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."* (Emphasis added) 118 U.S. at 381.

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[1] It has been suggested that ownership of the public domain is a vital source of federal power over Indians, COHEN, FEDERAL INDIAN LAW (revised by the U. S. Department of Interior, 1958) 931. This is true perhaps in a proprietary sense, that is, the land could perhaps be given to the Indians and reservations created thereon. Insofar as we are concerned with the violation of state sovereignty (by exempting persons of Indian blood from the operation of state fish and game laws on the public domain, tidelands, and inland waters where there are no Indian reservations) proprietary ownership in the United States is not a source of power. See *Hunt* v. *United States*, 278 U.S. 96; *Chalk* v. *United States*, 114 F.2d 207 (4th Cir., 1940), *cert. denied* 312 U.S. 679.

The facts of the *Kagama* case, *supra,* and the statute there under consideration limited the holding of the case and caused this Court to say:

> "Its effect [the statute] is confined to the acts of *an Indian of some Tribe,* of a criminal character, committed within the limits of the *Reservation.*" (Emphasis and words added) 118 U.S. at 385.

In our Statement of the Case, we have shown the complete integration of the members of Appellant corporations into the political structure of the state as is demonstrated by representation in the state legislature and on the State Board of Fish and Game (Statement of the Case especially notes 8, 13, 16).

The application of the *Kagama* case, *supra,* first to Metlakatla and then to Kake and Angoon will show that they cannot bring themselves within the Commerce Clause of the Federal Constitution.

A. Metlakatla Has Not Pleaded the Existence of a Tribe and Has Always Been Subject to Territorial and State Law Without Discrimination or Special Privilege.

Metlakatla is a heterogeneous community which does not meet the test of a "tribe."

The most recent judicial description of this community is found in *U. S.* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D.C. Alaska, 1st Div., 1958). According to the court, the people living on the Metlakatla reservation consist not only of Tsimpsean Indians from Canada but also Haida and Tlingit Indians, Eskimos and Aleuts, who left other communities of Alaska to take up residence on the Metlakatla reservation.[1] An Eskimo

[1] See also Complaint of Metlakatla (R. 5) where it is stated, "native born Alaskan Indians joined the original settlers. . . ."

served on the Metlakatla city council. The mayor of Metlakatla, as of the date of the opinion, was a Tlingit Indian originally from Sitka, Alaska. The original Metlakatlans (Tsimpseans) renounced aboriginal rights as a condition of entry into the United States.[2] The court also stated:

> "... In the past it has always been assumed that territorial law applied to Metlakatla." 161 F. Supp. at 270.
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> * * * * * * *
>
> "The residents of Metlakatla pay Territorial [now state] income taxes, school taxes, gasoline taxes and generally all forms of state taxes paid by other residents of Alaska. There has been no reluctance demonstrated by Alaskan authorities to govern the Indians of Southeastern Alaska." (Bracketed words added) 161 F. Supp. at 275.
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> * * * * * * *
>
> "It would seem that in view of the development of the Indians in Southeastern Alaska and *their participation in every phase of the life and economy of the white man* that every presumption should be indulged in to avoid the effects of racial segregation and discrimination and to recognize the nonexistence of Indian country in Southeastern Alaska...." (Emphasis added) 161 F. Supp. at 272.

They have voted for many years in the election of candidates for the territorial (now State Legislature). They voted to ratify the Constitution of Alaska and Ordinance No. 3 thereof abolishing fish traps. They

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[2] *U.S.* v. *Booth*, 17 Alaska 561, 161 F. Supp. 269 (1958).

voted in the election provided by the Alaska Enabling Act as to whether or not territory should receive statehood. Appellant Metlakatla alleges further in its complaint describing its community that:

> "The town site is divided into streets, alleys, blocks, and lots for residential and commercial purposes. . . . There are churches, homes, and stores; in general, Metlakatla bears a resemblance to any other small town in Alaska."[3]

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[3] The Metlakatla grade and high schools are state schools. It was not always so. In 1950 the Alaska Native Service made a new proposal to the territorial (local government) authorities for the transfer of a number of schools under Johnson-O'Malley contracts, and in 1951 the Area Director officially stated:

> "Plans are being completed whereby all ANS schools will be transferred to Territorial responsibility, in an orderly manner and on a yearly basis, by 1960." ANNUAL REPORT OF THE GOVERNOR OF ALASKA . . . . for the Fiscal Year 1952 (Washington: U.S. Government Printing Office) 80.

The Governor of Alaska commented:

> "This sound and enlightened program is, fortunately, a complete reversal of the policies pursued under a previous Secretary of the Interior creating Indian and Eskimo reservations and segregating the inhabitants thereon. . . . So, the Alaska Native Service's present policy of integration cannot be praised too highly." ANNUAL REPORT OF THE GOVERNOR, *supra* at 5.

See also, THE NATIONAL CONFERENCE AND THE REPORTS OF THE STATE ADVISORY COMMITTEES OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959 (Gov. Print. Office, 1960) 48 *et seq.*

In COHEN, FEDERAL INDIAN LAW (revised by U.S. Department of Interior, 1958) 941, the following statement is made:

> "The Alaska Native Service maintains schools in 84 villages. During the fiscal year 1957, 4,808 native children were enrolled in the Federal schools, 6,144 in the Territorial schools, and 724 in mission and other schools."

The only apparent difference is that the fee is held by the United States.

Under the test of the *Kagama* case (discussed, *supra* at 46-47):

Have the members of Appellant corporation, Metlakatla, preserved their tribal relations?

They have not pleaded the same.

Are they a separate people?

No, because they have been joined by other peoples as expressly permitted by the statute creating the reservation[4] and as the court said in the *Booth* case, *supra* at 272, they: "participate in every phase of the life and economy of the white man."

Do they possess sufficient attributes of sovereignty to regulate their internal and social relations, and have they thus far not been brought under the laws of the state?

No. It has always been assumed that territorial (now state) law applied. Members of Appellant corporations pay state income, school, gasoline and all other taxes.[5]

B. Kake and Angoon Have Not Pleaded a Reservation, Have No Tribal Organization, Are Incorporated Municipalities Under State Law Without Discrimination or Special Privileges.

Kake and Angoon except for Indian blood are in the same situation as the rest of the Alaskan fishing communities—financially poor, but an integral part of the greater community.

Kake and Angoon in their pleadings do not claim that

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[4] Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. §358.

[5] The Appellant corporations have claimed an immunity from the state raw fish tax. (For example, see R. 84)

either the communities or the fish trap sites are located on an Indian reservation.[6] The canneries are located on land previously held in fee by whites and were conveyed in the instance of Angoon in 1948 and Kake in 1950 (R. 137, 140). The community of Kake was incorporated as a first class city in 1952, and continues as such under the laws of the State of Alaska.[7] The order of incorporation recites that in excess of 100 bona-fide residents and inhabitants of the community petitioned the court to incorporate. After a hearing by the Court, an election was held at which 128 votes were cast for incorporation and 7 against. The mayor, councilmen and school directors were elected.

Angoon was incorporated many years ago as a village under local (territorial) law as distinguished from federal law.[8] These Appellants have been governed by State law the same as every other community in Alaska ever since the institution of civil government in Alaska. They have received different types of support from the federal government by way of health, welfare, education, etc., as have many communities in Alaska. Admittedly, with the critical depletion of migratory salmon resources under federal management, these villages *and others like them* have received territorial, state and federal welfare assistance as "depressed areas."

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[6] Apparently their communities are located in or on the edge of the Tongass National Forest. See *Tlingit and Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452 (Ct. Cl. 1959) and maps at 455 and 469. (See also R. 83, 103)

[7] See Appendix 9 for territorial district court order of "The matter of Incorporation of the City of Kake as a first class municipal corporation." Case No. 6688-A.

[8] COHEN, FEDERAL INDIAN LAW (revised by U. S. Department of the Interior, 1958) 960, footnote 2: ". . . villages like Angoon and Hoonah, organized before repeal of this law, continued to function although their status is doubtful."

The members of Appellant corporations Kake and Angoon are alleged to be "of the Thlinget Indian tribe." (R. 83, 102) This allegation is only a statement of racial origin and does not constitute a present claim of tribal organization, laws, or government.[9]

Although there may be some question as to the nature of the early tribal organizations, the United States Court of Claims as recently as October 15, 1959 stated:

> "Neither the Tlingits nor the Haidas were organized politically in a manner resembling the tribal organizations of the Indians of the United States." *Tlingit and Haida Indians of Alaska* v. *U. S.*, 177 F. Supp. 452, 454 (Ct. Cl. 1959)

As early as 1886 the existence of a tribal organization (a matriarchy) was nebullous[10] and had apparently disappeared prior to 1952.[11]

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[9] In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, the Court found that the Tee-Hit-Tons were an identifiable group of Alaskan Indians within the terms of a jurisdictional act. In dicta, the Court discusses the existence of Alaskan Indian tribes at a time not stated but remote. We believe that the use of the word "tribe" in relation to the claim for monetary consideration was not a finding of presently existing tribal organization of Tlingit Indians.

[10] *In re Sah Quah*, 31 Fed. 327 (D. Alaska, 1886) states the following:

> "From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts and the manner of their enforcement, marriage, descents, and the punishment for crimes committed against each other. They have been excused from all allegiance to the municipal laws

[Footnote 11 on Page 53]

As is true of Metlakatla, both Kake and Angoon enjoy state schools, (see discussion, *supra,* footnote 3 at page 49) and have exercised all territorial and state political rights.

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of the Whites as precedence or otherwise in relation to tribal affairs. . . .

". . . *but does the rule . . . apply to the Indians of Alaska?* I think not, and for various reasons. The United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every Act of Congress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts. Upon a careful examination of the habits of these Natives, of their modes of living, and their traditions, I am inclined to the opinion *that their system is essentially matriarchal, and not tribal, as we understand that term in its application to other Indians.* . . . " (Emphasis added)

[11] The court stated in the case of *United States* v. *Libby McNeil & Libby,* 14 Alaska 37, 107 F. Supp. 697 (D. C. Alaska, 1st Div., 1952) as follows:

". . . in the ensuing 54 years the Indians of southeastern Alaska, and particularly the Haidas, *have not only abandoned their primitive ways and adopted the ways of civilized life but are now fully capable of competing with the White in every field of endeavor* . . . it is a matter of common knowledge that today the Indians of southeastern Alaska prefer the White man's life despite all its evils and shortcomings . . .

"Whatever may be said in justification of reservations in the unsettled regions of Alaska, they are viewed as indefensible in southeastern Alaska, and generally condemned by Whites and Indians alike as racial segregation and discrimination in the worst form . . ." (Emphasis added) 107 F. Supp. at 699.

Under the test of the *Kagama* case (discussed, *supra* at 46, 47):

Have the members of Appellant corporations preserved their tribal relations?

No. If a tribal organization ever existed, it has apparently disappeared.

Are they a separate people?

No. Racially, they may be Thlingit Indians but from the standpoint of trade, commerce, social intercourse, and the exercise of political rights, they are part and parcel of the greater Alaskan community composed of whites and natives.[12] They do not live on a reservation.

Do they possess sufficient attributes of sovereignty to regulate their internal and social relations, and have they thus far not been brought under the laws of the State?

No. Both Kake and Angoon incorporated under state (previously territorial) law. Kake is a first class city and Angoon is a village whose incorporated status is questionable. The petition for incorporation of Kake addressed to the Territorial Court in 1952 clearly indicates a voluntary relinquishment of tribal government if in fact it had not disappeared long before that time.

It has always been assumed that territorial and now state laws applied to both the communities in question and Metlakatla. Kake and Angoon have not pleaded exclusion from state law generally, whether these laws relate to schools, welfare, public works, unemployment compensation, the exercise of the state elective fran-

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[12] *United States* v. *Libby McNeil & Libby*, *supra* note 11.

chise, or state income, gasoline, tobacco or school taxes.[13]

Congress has recognized the questionable tribal status of the Alaska natives by passing an amendment to the Indian Reorganization Act of 1934 [14] which would permit Alaskan Indians to incorporate as federal Indian corporations, receive federal loans, and conduct business activities even though such corporations were formed from groups which were neither recognized as Indian tribes nor living on reservations. The amendment provides:

> "Sections 461, 467, 468, 475, 477 and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided,* That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title."

The three Appellant corporations received their corporate charters pursuant to the above amendment, and all but three of a total of 59 such corporations [15] organized in Alaska under instructions of the Secretary of

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[13] Two exemptions from state laws are claimed by Kake and Angoon. One, an exemption from the raw fish tax on canning, and two, an exemption from the statewide fishing law (and constitutional ordinance) banning fish traps.

[14] 49 Stat. 1250 (1936), 48 U.S.C. § 362.

[15] COHEN, FEDERAL INDIAN LAW (revised by the United States Department of Interior, 1958) 962-963, note 14.

Interior indicating the primary purpose of incorporation was to facilitate business activities.[16] This does not make Appellants "tribal" as required by the Commerce Clause.

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[16] COHEN, *id.* at 962 reads as follows:

"The instructions on organization in Alaska, approved by the Secretary of the Interior on December 22, 1937, set forth the kinds of organization possible under the act:

"(1) A group consisting of all the native residents of a locality *may organize to carry on municipal and public activities as well as economic enterprises.* This type of organization would be suitable for exclusively native villages. Authority for municipal activities is based on the provision of section 16 of the act of June 18, 1934, providing that the constitutions may contain all powers of an Indian group recognized under existing law. The best example of this type of organization is the organization of the Eskimo villages.

"(2) Groups comprising all the native residents of a locality may *organize solely for business purposes without contemplating municipal activities. This type of organization is specially suitable in the case of Indian groups residing in white communities,* which communities already provide for municipal activities. Examples of such an organization are the organizations at Craig and Sitka.

"(3) *A group not comprising all the residents of a locality but comprising persons having a common bond of occupation or association may organize to carry on economic activities.* In the case of such organizations, cooperative and democratic features in the method of organization are encouraged and as wide a base among the natives is sought as is possible in the circumstances of the case. An example of such an organization is the Hydaburg Cooperative Association, composed of resident native fishermen of Hydaburg who have a common bond of occupation in the fish industry, including the catching, processing, and selling of fish and the building of fishing boats and equipment." (Emphasis added)

V

THE EQUAL FOOTING DOCTRINE PROHIBITS DISCRIMINATION AGAINST ALASKA IN THE CONTROL OF ITS FISH AND GAME, ITS INLAND WATERS AND ITS ORDINARY CITIZENS OF INDIAN BLOOD.

The Union Is Composed of Equal States.

(a) *Fish and Game.*

If the Court rules that Alaska has disclaimed absolute jurisdiction and control over all Indians fishing so as to leave a critical segment of the population outside the scope of state control, then the equal footing doctrine is squarely raised through failure to protect the vital state power to regulate fish and game as recognized in the following representative cases: *Geer* v. *Connecticut,* 161 U.S. 519; *Ward* v. *Race Horse,* 163 U.S. 504; *Patsone* v. *Pennsylvania,* 232 U.S. 138; *Kennedy* v. *Becker,* 241 U.S. 556; *Lacoste* v. *Dept. of Conservation,* 363 U.S. 545; *Tulee* v. *Washington,* 315 U.S. 681.

It is necessary to observe that those cases dealing with Indians' rights versus the power of the state to regulate and protect fish and game, e.g., *Ward* v. *Race Horse, supra,* and *Kennedy* v. *Becker, supra,* each upholding state regulatory power over fish and game, were cases dealing with tribal Indians. In the present litigation members of Appellant organizations are not tribal. This gives additional strength to the position of the State.

(b) *Inland Waters.*

We rely on the cases which we have previously cited in support of state jurisdiction over inland waters as

well as our previous argument that if *Appellants'* construction of Section 4 is a correct interpretation of the bilateral compact, the State of Alaska will have been denied equality, and Section 4 must be declared unconstitutional to the extent that it violates the equal footing doctrine. Control and regulation by Alaska of inland waters is unquestionably essential to equality with the other states.

(c) *Political rights.*

The equal footing doctrine is raised not only in relation to the state power to conserve fish and game and to exercise sovereignty over inland waters but also in relation to the state power to regulate and legislate for its own citizens where those citizens are not members of an Indian tribe nor living within an area wherein absolute jurisdiction and control is vested in the federal government, e.g., McKinley National Park (see Section 11 of the Statehood Act, 72 Stat. 339 [1958]). The denial to Alaska of political power over state citizens is much more serious than the denial to Oklahoma of the political power to move its state capitol, which was condemned by this Court in *Coyle* v. *Oklahoma,* 221 U.S. 539.

Appellants apparently claim that the State has ceded absolute jurisdiction and control over Indians as individuals without regard to tribal organization and in the instances of Kake and Angoon without regard to Indian reservations, when they begin to fish in any area of Alaska. Query: Has the State disclaimed absolute jurisdiction and control over the President of the First State Senate, Senator Beltz, a full blooded Eskimo from Unalakleet, Alaska when he drops a hook and begins to fish in State waters?

Appellant Metlakatla cites the acts of admission of other states of the Union which show that the cession of absolute jurisdiction and control must apply to a given area, i.e. "Indian Lands." (M. Br. 42) Inherent in the foregoing argument is the requirement of certainty. The disclaimer here fails to meet the test of certainty. As Appellant Metlakatla states:

> ". . . disclaimer provisions have been uniformly construed as excluding the authority of the State from the *area specified* . . . " (Emphasis added) (M. Br. 42-43)

In the Alaska Statehood Act jurisdiction is purportedly ceded over "such lands and other property" which "may"[1] be held by any natives or "is held by the United States in trust for said natives." The word "may," emphasized above, supports our argument that no grant was involved but only the preservation of the *status quo,* i.e., the right to assert a claim. How could there be a present ceding of jurisdiction over land the description of which will be known only if, sometime in the future, that land is successfully claimed in a law suit? Lands or other property "held in trust" by the United States must be equally certain as to description. Clearly, however, they *are not* the inland waters of the new state.

The federal power to foster and protect dependent Indian tribes required no cession of jurisdiction by Alaska for that power is an incident to the sovereignty

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[1] The word "may" was intentionally used to preserve the *status quo.* See Hearings before the Committee on Interior and Insular Affairs of the House, on Hawaii-Alaska Statehood, 84th Cong., 1st Sess. (1955) at 334 and 335.

of the Nation. By the same reasoning that power could not be augmented by virtue of a purported disclaimer by a State as a condition of entry into the Union.

We submit that no state has ever ceded the power to regulate a particular activity (e.g., Indians fishing) without regard to location. It is clear beyond doubt that the Commerce Clause does not give the Federal Government jurisdiction and control over Senator Beltz because of his race. The State does not lose the power to regulate Senator Beltz when he goes fishing because of his race, and the term "absolute jurisdiction and control" as applied to Senator Beltz is either surplusage [1] or is unconstitutional. The same is true of Appellants—none of which meets the definition of "tribe" and two of which have no reservation.

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[1] As an example of surplusage in an enabling Act, see *United States* v. *Board of Com'rs.*, 271 Fed. 747, 749-750 (E.D. Okla., 1921) affirmed in *United States* v. *Ransom*, 284 Fed. 108 (8th Cir. 1922), *affirmed per curiam* 263 U.S. 691.

CONCLUSION

The commercial fishing season will start in June. These Appellants must incur very large expenditures of funds to prepare and install fish traps—an expenditure that they can ill afford—unless Appellants prevail. State fishing regulations directed to conservation must be revised to allow for the efficiency of traps—if Appellants prevail. We urge that this Court rule on the merits, if possible, and finally lay to rest a controversy which by its nature continues to grow with each passing day.

The State of Alaska respectfully submits that the judgment of the District Court for the Territory of Alaska should be affirmed.

Dated at Washington, D. C., this 9th day of May, 1960.

Respectfully submitted,

RALPH E. MOODY,
Attorney General of Alaska.

JOHN L. RADER,
Special Counsel to the Governor.

DOUGLAS L. GREGG,
Assistant Attorney General.

CHARLES S. RHYNE,
Attorneys for Appellee.

Of Counsel:

RHYNE & RHYNE,
400 Hill Building,
Washington 6, D. C.

APPENDIX

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APPENDIX 1

Department of the Interior
United States Fish and Wildlife Service
Bureau of Commercial Fisheries
Alaska Region

Preliminary Alaska Commercial Fisheries Statistics—1959

These data were compiled by the Statistical Unit of the Bureau of Commercial Fisheries in Juneau, Alaska. All statistics are preliminary until printed in the Alaska Fisheries Leaflet (Annual Summary). Pounds and values are rounded to the nearest thousand.

Table 1—Catch Statistics

	Pounds [1]	Value to Fishermen
Salmon	147,278,000	$20,956,000
Herring	107,444,000	1,294,000
Halibut	29,974,000	4,298,000
Sablefish	2,355,000	179,000
Other (trout, bottomfish, etc.)	28,000	3,000
Clams	1,126,000	131,000
Crabs	22,053,000	1,738,000
Shrimp	13,052,000	506,000
Grand Total	323,310,000	$29,105,000

[1] Reported as whole round weight.

Table 2—Production Statistics

(Volumes and values of products prepared for market.)

Canned Products	Standard Cases	Pounds	Value
Salmon	1,778,289	85,358,000	$49,493,000
Steelhead trout	50	2,000	1,000
Clams	21,001	315,000	446,000
Crabs	70,907	1,383,000	1,777,000
Shrimp	104,327	1,565,000	1,686,000
Total	1,974,574	88,623,000	$53,403,000

Fresh, Frozen, and Cured Products:		
Salmon	13,273,000	$ 6,742,000
Halibut	26,051,000	6,057,000
Herring	4,696,000	231,000
Sablefish	1,818,000	345,000
Other	31,000	5,000
Crabs	3,989,000	2,930,000
Shrimp	400,000	342,000
Sea Lion	223,000	24,000
Kelp with herring eggs	108,000	36,000
Total	50,589,000	$16,712,000
Byproducts:		
Herring: Meal	16,189,000	$ 1,116,000
Oil (1,778,248 gallons)	13,337,000	898,000
Solubles (70,620 gallons)	706,000	18,000
Fur Seal: Meal	659,000	26,000
Oil (39,307 gallons)	295,000	18,000
Shrimp: Meal	178,000	12,000
Total	31,364,000	$ 2,088,000
Grand Total	170,576,000	$72,203,000

APPENDIX 2

TABLE 11 [1]

Products—1949–53	Southeast		Central & Interior		North & West	
	Thous. $	%	Thous. $	%	Thous. $	%
	(Annual average values)					
Commercial fisheries (wholesale)	40,307	85.9	31,984	57.2	17,566	61.3
Furs (raw)	842	1.8	594	1.1	3,239	11.3
Other tangible wildlife values[2]	1,135	2.4	4,600	8.2	2,315	8.1
Forest products (f.o.b. mill)	4,088	8.7	1,761	3.1	25	0.1
Mineral products	68	0.1	9,811	17.5	5,379	18.8
Stone, sand, gravel	144	0.3	5,344	9.6	84	0.3
Agricultural products (wholesale)	360	0.8	1,840	3.3	39	0.1
All natural resources products	46,944	100.0	55,934	100.0	28,647	100.0

[1] Rogers, ALASKA IN TRANSITION (1960) p. 59.
[2] Minimum food value of game taken by resident hunters, and expenditures by nonresident sportsmen.

APPENDIX 3

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington

April 6, 1960.

[25 CFR Part 88]

INDIAN FISHING REGULATIONS IN ALASKA

Notice is hereby given that pursuant to the obligation imposed upon, and the authority vested in, the Secretary of the Interior by Section 2 and 9 of Title 25, and Section 485 of Title 5, U.S. Code, and Section 4 of the Act of July 7, 1958, 72 Stat. 339 amended, 73 Stat. 141, it is proposed to amend 25 CFR by adding a new part 88 as set forth below. The purpose of these amendments is to protect certain fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., other Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by Section 4 of the Alaska Statehood Act of July 7, 1958.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments, to the Commissioner, Bureau of Indian Affairs, Washington 25, D. C., within 30 days after the date of publication of this notice in the Federal Register.

Part 88, reading as follows, is added to 25 CFR, Subchapter H:

§ 88.1 *Scope.* These regulations implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. These regulations are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§88.2 *Restrictions on Native Indian Traps.*

(a) Not more than the 21 salmon fish-trap sites heretofore recognized as Indian salmon fish-trap locations as hereinafter described may be utilized for the purpose of salmon trap fishing by Indian villages, within the following described waters at the sites described. Subject to the limitations of paragraph (e) of this section, traps owned and operated by the native villages may be operated at any time within a described area when salmon net fishing is permitted in any part of such area, or adjacent districts, by the State of Alaska:

Angoon Community Association.

(b) Within all waters in Chatham Strait between a true eastward line from South Passage Point and a true westward line from Point Gardner to Baranof Island; and the waters of Peril Strait north and east of Sergius Narrows, including Hoonah Sound, at the following sites:

(1) Chichagof Island at 57° 36′ 16″ north latitude, 134° 51′ 34″ west longitude.

(2) Admiralty Island at 57° 22′ 28″ north latitude, 134° 34′ 18″ west longitude.

(3) Killisnoo Island at 57° 28′ 15″ north latitude, 134° 36′ 35″ west longitude.

(4) Admiralty Island at 57° 13′ 52″ north latitude, 134° 39′ 05″ west longitude.

Organized Village of Kake

(c) All waters, except (1) those within a line from Point Bishop to 58° 11′ 28″ north latitude, 134° 5′ west longitude, (2) northeast of a line from Point Styleman to Point Anmer, and (3) waters south of a line from Point Ellis to Patterson Point; within a line following the latitude of Cape Decision easterly to Cape Decision, thence following the watershed on Kuiu Island to 56° 40′ north latitude, 133° 44′ 15″ west longitude, thence east across Keku Strait, thence across Kupreanof Island, passing north of Duncan Canal, to 56° 54′ north latitude, thence to Horn Cliffs, thence to Castle Mountain, thence following the international boundary to Mount Ogilvie, thence to the northern extremity of Shelter Island, thence to the northern extremity of Mansfield Peninsula, thence following the water-

sheds on Mansfield Peninsula and Admiralty Island to the southern extremity of Point Gardner, thence west to the watershed on Baranof Island, thence following the watershed to Cape Ommaney, thence the latitude of Cape Ommaney projected westward.

(1) Stephens Passage at 57° 21′ 20″ north latitude, 133° 27′ 02″ west longitude.
(2) Frederick Sound at 57° 11′ 27″ north latitude, 133° 34′ 02″ west longitude.
(3) Frederick Sound at 57° 10′ 52″ north latitude, 133° 32′ 44″ west longitude.
(4) Admiralty Island at 57° 18′ 40″ north latitude, 133° 57′ 21″ west longitude.
(5) Admiralty Island at 57° 10′ 29″ north latitude, 134° 12′ 53″ west longitude.
(6) Herring Bay at 57° 07′ 21″ north latitude, 134° 19′ 45″ west longitude.
(7) Admiralty Island at 57° 04′ 02″ north latitude, 134° 25′ 20″ west longitude.
(8) Kupreanof Island at 57° 01′ 23″ north latitude, 134° 02′ 50″ west longitude.
(9) Kuiu Island at 56° 55′ 52″ north latitude, 134° 16′ 08″ west longitude.

Metlakatla Indian Community

(Annette Island Fishery Reserve)

(d) All waters within a line from the international boundary at 131° west longitude to Mary Island light, Hog Rocks light, Bold Island light, Race Point, thence to the southern extremity of Vallenar Point, thence to Point Higgins, thence to Casmano Point, thence down the middle of Clarence Strait to the International boundary:

(1) Annette Island at 55° 15′ 09″ north latitude, 131° 36′ 10″ west longitude.
(2) Annette Island at 55° 12′ 52″ north latitude, 131° 36′ 10″ west longitude.
(3) Annette Island at 55° 02′ 47″ north latitude, 131° 38′ 53″ west longitude.
(4) Annette Island at 55° 05′ 41″ north latitude, 131° 36′ 39″ west longitude.
(5) Annette Island at 55° 01′ 54″ north latitude, 131° 38′ 36″ west longitude.

(6) Annette Island at 55° 00′ 45″ north latitude, 131° 38′ 30″ west longitude.

(7) Annette Island at 54° 59′ 41″ north latitude, 131° 36′ 48″ west longitude.

(8) Ham Island at 55° 10′ 13″ north latitude, 131° 19′ 31″ west longitude.

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, the villages may operate traps only at the following sites: Angoon: (1) (2) and (4); Kake: (3) (4) (8) and (9); Metlakatla: (2) (3) (4) and (6).

§ 88.3 *Size and operation of Indian salmon traps.*

(a) No trap shall extend more than 900 feet from shore to the outer face of the pot as measured at mean high tide when any part is in a greater depth of water than 100 feet.

(b) Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height of at least 4 feet above the water. A draw line shall be reeved through the lower end of both poles and the top of one. During any period when commercial net fishing for salmon is prohibited by the State of Alaska in the waters open to trap fishing as above described, the tunnel walls shall be overlapped as far as possible, the line pulled tight and both secured so as to close the trap to fishing. In addition 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fish.

§ 88.4 *Definition, Karluk Indian reservation.*

The Karluk Indian reservation includes all waters extending 3,000 feet from the shore at mean low tide on Kodiak Island beginning at the end of a point of land on the shore of Shelikof Strait about 1¼ miles east of Rocky Point and in approximate latitude 57 degrees 39′ 40″ N., longitude 154° 12′ 20″ W.; thence south approximately 8 miles to latitude 57° 32′ 30″ N.; thence west approximately 12½ miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait; thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

§ 88.5 *Fishing restrictions, Karluk Indian reservation.*

(a) Commercial fishing in the waters of the Karluk Indian reservation shall be limited to the bona fide native inhabitants of the village of Karluk and vicinity.

(b) Seasonal and gear restrictions. Commercial fishing in waters of the Karluk Indian reservation shall be limited to the time, means, methods, and extent of fishing authorized by the State of Alaska in an area bounded by a line from Cape Karluk northeasterly to midstream, thence up the middle of Shelikof Strait to 58° 26′ 30″ north latitude, thence southeasterly to Cape Paramanof, thence to Raspberry Strait light, thence to Malina Point light, thence to West Point, thence to Chief Point, thence to the southern point at the entrance to Larsen Bay at 57° 32′ N. latitude, thence to Karluk Lake and back to point of beginning at Cape Karluk; *provided* that no license shall be required of the native inhabitants of the village of Karluk, Alaska, when engaged in commercial fishing in the waters of the Karluk Indian reservation.

§ 88.6 *Commercial salmon fishing by native Indians in the Yukon and Kuskokwim Rivers.*

Certain fishing rights in the Yukon and Kuskokwim Rivers granted by Federal law and running to the native Indians of Alaska are preserved in the Statehood Act. Since the State of Alaska by Part 103 of the Regulation of the Alaska Board of Fish and Game for Commercial Fishing in Alaska (1960 Edition) has recognized these rights, no additional provision therefore is made at this time in these regulations.

§ 88.7 *Personal use fishing by native Indians.*

In all waters of Alaska Indians, Eskimos and Aleuts shall be permitted to take salmon or other species of fish for personal use except in those waters where the State of Alaska has determined that a completed prohibition on all fishing is necessary to prevent the destruction of existing salmon or other fish populations.

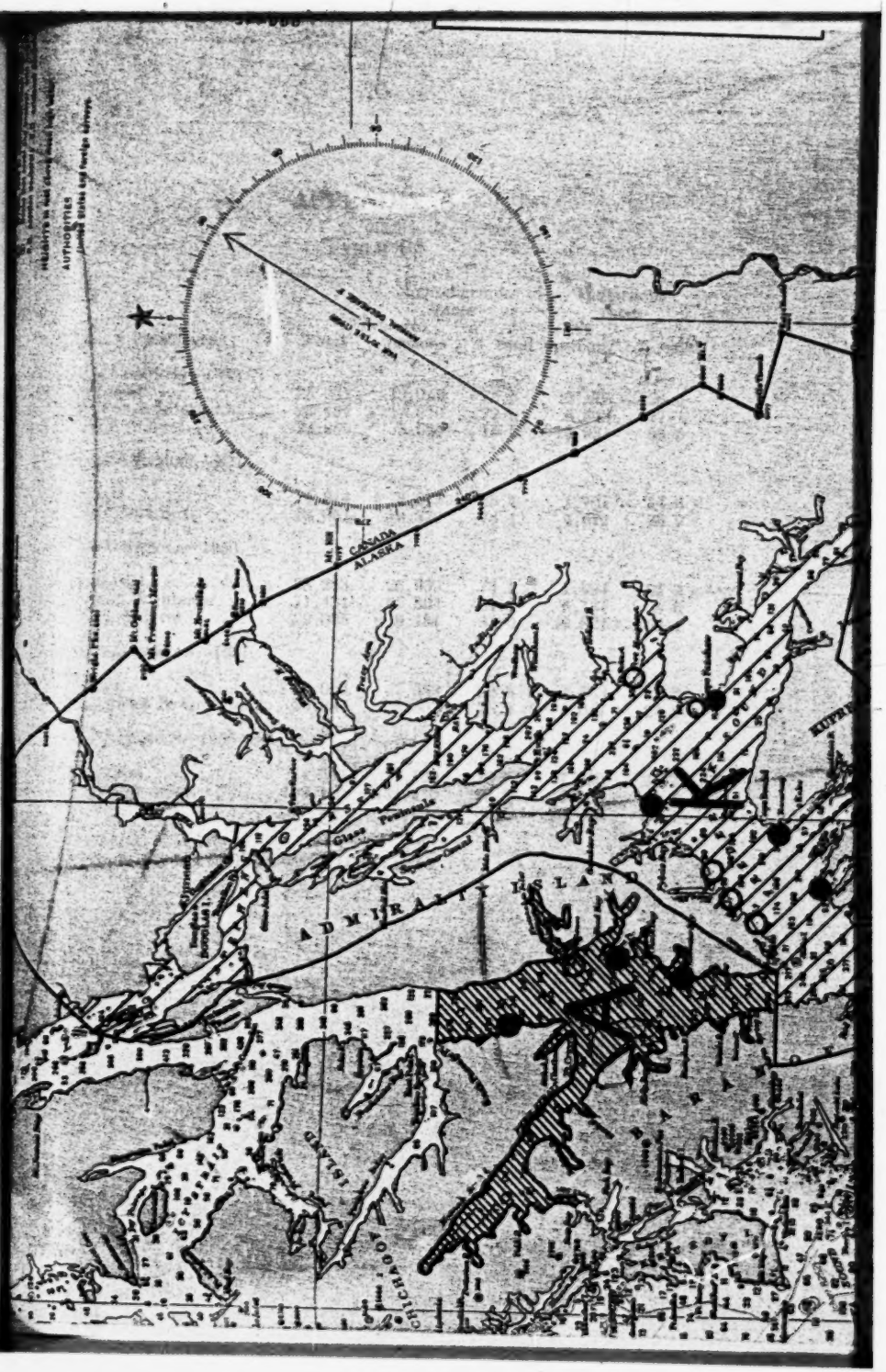
§ 88.8 *Modification of regulations.*

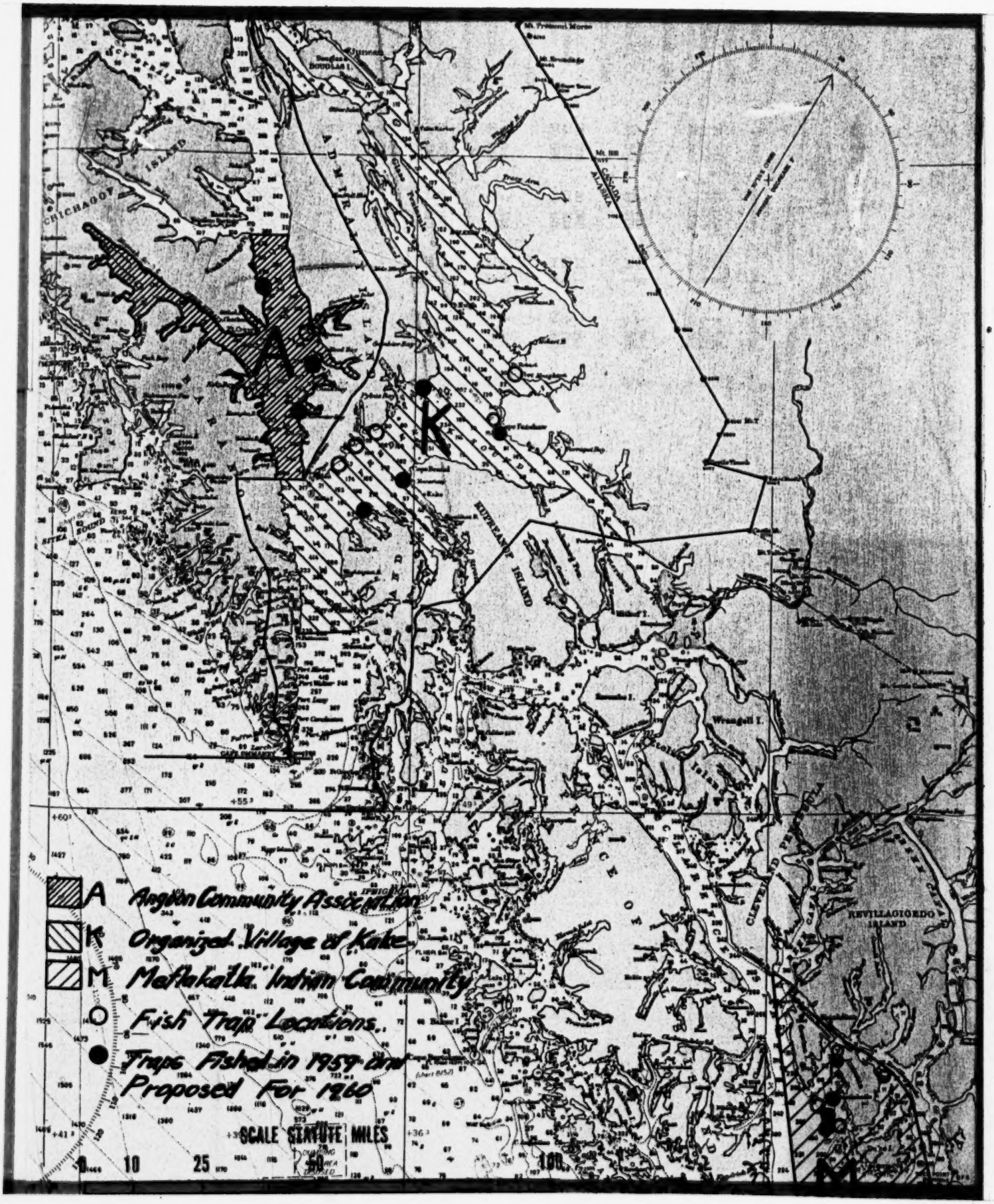
The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations.

§ 88.9 *Enforcement.* Fishing activities in violation of these regulations will be subject to the sanctions imposed by the Act of June 6, 1924, as amended, 48 U.S.C. 226.

(Original signed FRED A. SEATON,)
Secretary of the Interior.

(Here follows 1 map, Appendix 4)




A Angoon Community Association
K Organized Village of Kake
M Metlakatla Indian Community
Fish Trap Locations
Traps Fished in 1959 and Proposed For 1960
SCALE STATUTE MILES
0 10 25 50 100
CHICHAGOF ISLAND
ADMIRALTY
KUIU ISLAND
KUPREANOF ISLAND
Wrangell I.
REVILLAGIGEDO ISLAND
CLEVELAND PENINSULA

APPENDIX 5

TABLE 6[1]

Region & census year	Total	Nonindigenous races No. persons	Nonindigenous races % total	Indigenous races No. persons	Indigenous races % total
Alaskan Regions—1939					
Southeast	25,241	19,062	75.5	6,179	24.5
Central & Interior	23,427	17,079	72.9	6,348	27.1
North & West	23,856	3,925	16.5	19,931	83.5
Canadian Regions—1941					
Yukon	4,914	3,213	65.4	1,701	34.6
Northwest B. C.	18,051	13,379	74.1	4,672	25.9
Alaskan Regions—1950					
Southeast	28,203	20,909	74.1	7,294	25.9
Central & Interior	71,434	65,304	91.4	6,131	8.6
North & West	29,005	9,181	31.6	19,824	68.4
Canadian Regions—1951					
Yukon	9,096	7,533	82.8	1,563	17.2
Northwest B. C.	20,854	15,807	75.8	5,047	24.2
Alaskan Regions—1956 (est.)					
Southeast	34,600	27,100	78.3	7,500	21.7
Central & Interior	138,110	131,610	95.3	6,500	4.7
North & West	33,290	13,290	39.9	20,000	60.1

[1] *Rogers*, ALASKA IN TRANSITION (1960) p. 55.

APPENDIX 6

Authorization for Fish Traps

of

Annette Island Fishery Reserve, Kake, and Angoon

abstracted [by Appellee] from

"Laws and Regulations for Protection of the Commercial Fisheries of Alaska," 1945 to 1959

published by the

U. S. Department of Interior, Fish and Widlife Service

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REGULATIONS PERTAINING TO THE *METLAKATLA* AREA

Annette Island

Year	Part & Section	Title of Section
1959	115.26	Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites: (a) Annette Island Fishery Reserve: (1) Annette No. 3, located at 55° 02′ 47″ N. lat., 131° 38′ 53″ W. long.; (2) Annette No. 4, located at 55° 05′ 41″ N. lat., 131° 36′ 39″ W. long.; (3) Annette No. 6, located at 55° 00′ 45″ N. lat., 131° 38′ 30″ W. long.; (4) Annette No. 8, located at 55° 10′ 13″ N. lat., 131° 19′ 31″ W. long.
1958	115.27	Areas open to traps. The use of any trap for the capture of salmon is prohibited, except as follows: (f) Clarence Strait destrict (there follows a list and description of 44 areas open to traps)

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	122.8	28
1956	122.8	27
1955	122.8	24
1954	122.8	23
1953	122.8	39
1952	122.8	39
1951	122.8	39

Year	Part & Section	Number of Traps Permitted
1950	122.8	38
1949	122.8	38
1948	227.15	39
1947	227.15	39
1946	227.15	33
1945	227.15	33

REGULATIONS PERTAINING TO AREA IN WHICH *KAKE* TRAPS ARE LOCATED

1959 115.26 Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(b) Organize Village of Kake:

(1) Kake—Cape Fanshaw, located at 57° 10′ 52″ N. lat., 133° 32′ 44″ W. long.

(2) Kake—Point Pybus, located at 57° 18′ 40″ N. lat., 133° 57′ 21″ W. long.

(3) Kake—Point Macartney, located at 57° 01′ 23″ N. lat., 134° 02′ 50″ W. long.

(4) Kake—Cornwallis, located at 56° 55′ 52″ N. lat., 134° 16′ 08″ W. long.

1958 115.27 Areas open to traps. The use of any trap for the capture of salmon is prohibited, except as follows: (c) Eastern district: (there follows a list of 11 areas open to traps).

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	119.9	9
1956	119.9	8
1955	119.9	6
1954	119.9	9
1953	119.9	11
1952	119.9	11
1951	119.9	7
1950	119.9	7
1949	119.9	13
1948	224.16	11
1947	224.16	11
1946	224.16	11
1945	224.16	11

REGULATIONS PERTAINING TO AREA IN WHICH *ANGOON* TRAPS ARE LOCATED.

1959 115.26 Sites open to native Indian traps. Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(c) Angoon Community Association:

(1) Angoon—Basket Bay, located at 57° 36′ 16″ N. lat., 134° 51′ 34″ W. long.

(2) Angoon—Eagle Island, located at 57° 22′ 28″ N. lat., 134° 34′ 18″ W. long.

(3) Angoon—Point Caution, located at 57° 13′ 52″ N. lat., 134° 39′ 05″ W. long.

1958 115.27 Areas open to traps. The use of any trap for the capture of salmon is prohibited as follows:
(b) Western district: (there follows a list and description of 13 areas open to traps).

(The same method of defining areas in which traps are permitted, with year, citation of regulation, and number of traps follows):

Year	Part & Section	Number of Traps Permitted
1957	118.16	7
1956	118.16	9
1955	118.16	7
1954	118.16	7
1953	118.16	13
1952	118.16	13
1951	118.16	13
1950	118.16	13
1949	118.16	13
1948	223.19	13
1947	223.19	13
1946	223.19	13
1945	223.19	13

(Here follows 1 Paster, Appendix 7)

APPENDIX 7

[prepared by Appellee]

INFORMATION FROM ANNUAL REPORTS, UNITED STATES DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE—(Fishery Management Reports for Districts involved) SHOWING TRAP SITES FISHED AND YEARS, 1945 TO PRESENT, INCLUSIVE.

Sites reserved for native Indian traps: None.

				Years Operated														
(a) Annette Island Fishery Reserve*				60****	59	58	57	56	55	54	53	52	51	50	49	48	47	46	45
1. Annette No. 3 (302)	location	44° 02′ 47″ N. lat.	131° 38′ 53″ W. long	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
2. Annette No. 4 (301)	"	55° 05′ 41″ " "	131° 36′ 39″ " "	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X
3. Annette No. 6 (304)	"	55° 00′ 45″ " "	131° 38′ 30″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
4. Annette No. 8 (344)	"	55° 10′ 13″ " "	131° 19′ 31″ " "	X	X	X	X				X	X	X	X	X		X	X	X
5. Annette Is. (2)(299)	"	55° 15′ 09″ " "	131° 36′ 10″ " "								X	X	X	X	X	X	X	X	X
6. Annette Is. (300)	"	55° 12′ 52″ " "	131° 36′ 10″ " "					X		X	X	X	X	X	X	X	X	X	X
7. Annette Is. (303)	"	55° 01′ 54″ " "	131° 38′ 36″ " "								X	X	X	X	X	X	X	X	X
8. Annette Is. (305)	"	54° 59′ 41″ " "	131° 36′ 48″ " "								X	X	X	X	X	X	X	X	X
(b) Organized Village of Kake**																			
1. Cape Fanshaw (214)	"	57° 10′ 52″ N. lat.	133° 32′ 44″ W. long	X	X	X	X	X	X	X	X	X	X				X	X	X
2. Point Pybus (216)	"	57° 18′ 40″ " "	133° 57′ 21″ " "	X	X	X					X	X	X	X		X	X	X	X
3. Point Macartney (229)	"	57° 01′ 23″ " "	134° 02′ 50″ " "	X	X	X	X		X		X	X	X	X	X	X	X	X	X
4. Cornwallis (232)	"	56° 55′ 52″ " "	134° 16′ 08″ " "	X	X	X		X		X	X	X	X	X	X	X	X	X	X
5. Stephens Passage (Pt. Hobart) (210)	"	47° 21′ 20″ " "	133° 27′ 02″ " "								X	X	X				X	X	X
6. Frederic Sound (Deepwater Pt.) (221)	"	57° 11′ 27″ " "	133° 34′ 02″ " "								X	X	X	X		X	X	X	X
7. Admiralty Is. (226) (Pt. Brightman)	"	57° 10′ 29″ " "	134° 12′ 53″ " "				X	X	X	X	X	X	X	X	X	X	X	X	X
8. Herring Bay (223)	"	57° 07′ 21″ " "	134° 19′ 45″ " "											X			X	X	X
9. Admiralty Is. (213) (Cande Pt.)	"	57° 04′ 02″ " "	134° 25′ 20″ " "														X	X	X
(c) Angoon Community Association***																			
1. (177) Chichagof Is. Basket Bay (3)	"	57° 36′ 16″ " "	134° 51′ 34″ " "	X	X	X					X	X	X	X		X	X	X	X
2. (202) Admiralty Is. Eagle Is. (2)	"	57° 22′ 82″ " "	134° 34′ 18″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
3. Killisnoo Is. (9) (203)	"	57° 28′ 15″ " "	134° 36′ 35″ " "								X	X	X	X	X	X	X	X	X
4. (206) Admiralty Is. Point Caution (1)	"	57° 13′ 52″ " "	134° 39′ 05″ " "	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

* Operated by Meltakatla beginning with 1950 per this Appendix.

** operated by Kake since 1950, inclusive.

*** operated by Angoon since 1948, inclusive.

**** from proposed regulations published 25 Fed. Reg. 3079, April 9, 1960.

APPENDIX 8

CERTIFICATE

I, HUGH J. WADE, certify that I have been elected and am the duly qualified Secretary of State for the State of Alaska; that as Secretary of State I have custody of the records of the proceedings of the Constitutional Convention of 1955, 1956 for the State of Alaska; that I have examined the attached portion of the record of the proceedings of that convention; that I have compared it with the original record of said proceedings in my custody and find that the attached portion of said record is a true and correct copy of the cited portion of the original record.

Given under my hand and the Seal of the State of Alaska, in the City of Juneau, this 26th day of June, 1959.

HUGH J. WADE,
Secretary of State of the State of Alaska.

PROCEEDINGS OF CONSTITUTIONAL CONVENTION, 64TH DAY, JAN. 25, 1956

President EGAN: The Convention will come to order. Mr. Stewart changes his vote to yes.

The result of the roll call was then announced.

President EGAN: And so the Yeas have it and the proposed amendment is ordered adopted.

Delegate MCNEES: Inasmuch as we have transacted some business, I again move that we recess until ten minutes after four.

President EGAN: Mr. McNees moves and asks unanimous consent that the Convention stand at recess until ten minutes after four. Is there objection? Hearing no objection it is so ordered.

The Convention was then at its regular afternoon recess.

President EGAN: The Convention will come to order. We have before us Committee Proposal No. 16. Are there other amendments to Committee Proposal No. 16?

Delegate VICTOR FISCHER: Point of order.

President EGAN: Your point of order, Mr. Fischer.

Delegate VICTOR FISCHER: According to the calendar the next business is Style and Drafting reports.

President EGAN: Well, Mr. Fischer, that is correct. But it is the recollection of the Chair that we were on a unified Committee Proposal No. 16. Then Mr. White made his proposal or served notice of reconsideration and that brought Committee Proposal No. 16 back before us in its original position. If there are no other amendments we could have it on its way to Engrossment and Enrollment quickly; that is the only feeling the Chair had on it.

Delegate VICTOR FISCHER: I don't want to delay this matter but I have a question on this Section.

President EGAN: Well it would be before us in reconsideration in its original status as it came before the body.

Delegate VICTOR FISCHER: May I address it to the Chairman of the Ordinance Committee?

President EGAN: There is no objection, Mr. Fischer.

Delegate VICTOR FISCHER: The section deals with a disclaimer to the property held by the United States and the property claimed or owned by the natives of Alaska. The language followed is that in House Bill 2535. Has the Committee taken into consideration the fact that the Senate in its Enabling Bills has ordered a different section covering this matter and there has been very strong disagreement between the two houses, the Senate not being willing to yield to the House version.

President EGAN: Mr. McNealy, could you answer that question.

Delegate MCNEALY: Mr. President, the Committee had considered that particular point and our thought and purpose of continuing the language of the House Bill was due to the fact that the House Bill is still in the House of Representatives as it is. This particular House Bill wasn't defeated; it was sent back to Committee and our only thought on that point was that since it was back to Committee and there was even a possibility of that same bill coming out or the same bill being reintroduced at the next session of Congress or, if by any long chance, that bill can be reported out of Committee again this year, then it would be in the exact language as the House Bill which in effect isn't completely dead, although it is pretty well buried in Committee. As it was impossible for us to set up two alternatives, we more or less figured the lesser of two evils.

Delegate VICTOR FISCHER: I was wondering whether Sec-

tion 2 might not possibly—Mr. Smith's amendment which we adopted as Section 2—might not possibly cover the reservations of rights to

Constitutional Convention Committee Proposal 16

January 19, 1956.

Constitutional Convention of Alaska

COMMITTEE PROPOSAL NO. 16

Introduced by Committee on Ordinances and Transitional Measures

GENERAL AND MISCELLANEOUS PROVISIONS

RESOLVED, that the following be agreed upon as part of the Alaska State Constitution.

Disclaimer Regarding Native Lands

Section 1. The state of Alaska and its people do agree that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of the Act of Admission of this state, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe and except when held by individual natives in fee without restrictions on alienation; and that no taxes shall be imposed by the State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without

restriction on alienation; and no legislative act by the State of Alaska shall be taken thereon. Nothing in this section shall prevent this state from accepting any payments in lieu of taxes that may be authorized by the Congress. The foregoing ordinance shall be irrevocable without the consent of the United States and the people of this State.

Consent to Enabling Act

Section 2. The State of Alaska and its people hereby consent to all and singular the provisions of the Enabling Act that is passed by Congress and approved by the President for the admission of Alaska into the Union of States.

University of Alaska

Section 3. The University of Alaska is hereby established as the state university and constituted a body corporate to continue uninterrupted in all repects as provided by law.

APPENDIX 9

IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

No. 6688-A.

In the Matter of the incorporation of the CITY OF KAKE as a First Class Municipal Corporation

ORDER OF INCORPORATION

At this time the Court considers the records and files herein, from which it appears and the Court finds that heretofore a petition was duly filed in this Court and cause executed by more than one hundred bona fide residents and inhabitants of the community of Kake of the First Division of the Territory of Alaska, praying that said community become incorporated as a first class city under the laws of the Territory of Alaska.

That upon consideration of the said petition this Court made its Order of August 23, 1952, directing that a hearing be had upon the said petition before the Court; that three copies of the said Order were duly posted and remained posted in three most conspicuous places within the boundaries of the territory to be incorporated as aforesaid.

That a hearing was had upon the said petition on September 23, 1952 before the Court and no one appeared in opposition thereto; that upon such hearing this Court made its certain Order of September 23, 1952, finding that it is for the best interests of the said community and its inhabitants that it become incorporated as a city of the first class.

That in said Order of September 23, 1952 the Court did designate the name of the said proposed corporation and did fix the territorial boundaries and limits to be embraced therein, reforming the same as appears by plat attached to said Order of September 23, 1952, and further did fix the time and place for the holding of an election to determine whether a majority of the qualified residents and inhabitants of said community desire to become incorporated as a city of the first class and did appoint three qualified and competent persons as judges of the said election.

That copies of the said Order of Election were duly

posted and remained posted as required by law in the three most conspicuous public places within the limits of the territory to be embraced in and so incorporated.

That pursuant to said Order an election was duly held on the 31st day of October, 1952, and the said election judges, theretofore duly qualifying themselves, have returned into this Court their return and certificate from which it appears and the Court finds that 128 votes were cast for and 7 votes were cast against said incorporation of said community as a city of the first class.

That at said election, and by a separate ballot the said electors cast their ballots for the election of six councilmen and a mayor and five school directors of the said corporation; that it appears from the said return and certificate that the following named persons received the highest number of votes for the offices set opposite their respective names, to-wit:

John Bean	Mayor
Andrew Gamble	Councilman
Daniel Paul	Councilman
Raymond Bell	Councilman
Walter Williams Sr.	Councilman
Mitchell Martin	Councilman
Frank Gordon	Councilman
Morris Grant	School Director
Thomas L. Jackson	School Director
Willie Duguqua	School Director
Mrs. Helen Skeak	School Director
James Thomas	School Director

That all matters and things required to be done and observed in the premises have been done and performed in conformity with the laws of the Territory of Alaska and the Orders of the Court.

And now, the Court being advised and having found as aforesaid:

IT IS ORDERED, ADJUDGED AND DECREED that the community, commonly known as KAKE, situate and existing in the First Judicial Division of the Territory of Alaska, be and hereby is incorporated as a municipality of the first class, pursuant to and under the laws of this Territory, and shall enjoy and possess all the rights, powers and privileges granted by law unto cities of the first class; that the boundaries

of said community thus incorporated be and hereby are as follows:

Commencing at Corner No. 1, which is identical with Corner No. 1 of U.S. Survey (Alaska) No. 1871, and from which United States Land Monument No. 1871 bears South 28 degrees 17 minutes East a distance of 879.70 feet;

Thence North 57 degrees 16 minutes East a distance of 1164.14 feet to Corner No. 2;

Thence South 43 degrees 10 minutes East a distance of 4678.56 feet to Corner No. 3;

Thence South 45 degrees 17 minutes East a distance of 4092.51 feet to Corner No. 4;

Thence South 38 degrees 00 minutes West a distance of 2371.66 feet to Corner No. 5;

Thence North 51 degrees 46 minutes West a distance of 2420.56 feet to Corner No. 6;

Thence North 42 degrees 11 minutes West a distance of 3712.13 feet to Corner No. 7;

Thence North 62 degrees 49 minutes West a distance of 2479.23 feet to Corner No. 8;

Thence North 7 degrees 34 minutes West a distance of 1905.81 feet to Corner No. 9;

Thence North 77 degrees 57 minutes East a distance of 1250.00 feet to Corner No. 1, the point of beginning;

all of which appears on the plat thereof attached hereto; and it is further—

ORDERED, ADJUDGED AND DECREED that the aforesaid persons elected to the offices respectively set opposite each name be and hereby are declared duly elected to such offices of the City of Kake, and upon taking the oath of offices as required by law are entitled to hold such offices and perform the duties and functions thereof from this date for the term of each respective office provided by law.

Done at Ketchikan, Alaska, this November 7th, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Presented by:

WILLIAM L. PAUL JR.,
Petitioners' Attorney.

[Map omitted in printing.]